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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 560

WILLIAM J. LAVERICK,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 15, 1965.[1]

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[1]The judgment below affirmed the convictions of petitioner (Appellant in No. 14874), Harrison F. Tryon (Appellant in No. 14875) and Malcolm Schaeffer (Appellant in No. 14876). Petitioner herein has been advised that a separate petition for certiorari is being filed on behalf of Schaffer.

## OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix C hereto, *infra*, is unreported.[2]

## JURISDICTION

The judgment of the Court of Appeals was filed on July 15, 1965. On August 5, 1965, this Court entered an order extending time to file petition for writ of certiorari to and including September 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), and Supreme Court Rules 19-1(b) and 22-2.

## QUESTIONS PRESENTED

1. Whether there were unlawful and unauthorized interceptions of telephone calls within the meaning of Section 605 of the Federal Communications Act (48 Stat. 1103, 47 U.S.C. § 605), so as to render inadmissible in federal court information obtained thereby and divulgence of such intercepted conversations.

2. Whether petitioner's Constitutional rights have been so violated as to require this Court to exercise its supervisory powers over the fair administration of criminal justice where

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[2]The entire record on appeal has been certified and filed with the Court. References to the printed portions of such record shall be as follows: Appendix for Appellant (pp. 1a-126a) shall be designated as "Pet"; and Appendix for Appellee (pp. 1b-96b) designated as "Govt". Unprinted transcripts of the record will state the witness, with the (item number) of the Docketed Papers on Appeal in which such testimony is found.

(a) the principal government witness, although the initiating party to telephone conversations, was asked on direct examination and testified only to the "substance" of such conversations, making no reference to the fact that such calls were intercepted and recorded by the F.B.I., and the trial judge, over objections, thereafter allowed an agent of the F.B.I., who was not a party to such conversations, to read into evidence as part of the government's main case the entire transcripts of the intercepted calls which the agent had prepared from the recordings thereof; and

(b) where such principal government witness admitted on cross-examination that such telephone calls had been intercepted and recorded by the F.B.I., and the trial judge, over objections, allowed such witness to use transcripts prepared by the F.B.I. of such recordings, supplied him by government counsel during the course of cross examination, to "refresh his recollection" while on cross-examination.

3. Whether the petitioner's rights under the Fourth and Fifth Amendments to the Federal Constitution were violated by the ruling of the trial judge in allowing the F.B.I. agent, over objections, to read into evidence the transcripts of the telephone conversations which he prepared from the recordings of such telephone calls made without the knowledge or consent of petitioner or his alleged co-conspirators.

## CONSTITUTION AND STATUTES INVOLVED

The constitution and statutory provisions involved are the Fourth and Fifth Amendments to the Federal Consti-

tution, and Title 47 United States Code § 605 (48 Stat. 1103). They are printed in Appendix A, *infra*.

## STATEMENT

Petitioner and two others, Harrison F. Tryon and Malcolm Schaeffer, co-appellants below, were convicted on all counts of a three-count indictment. Count I charged that petitioner and Tryon, aided and assisted by Schaeffer, in violation of 18 U.S.C. §371, conspired together during the period from April 25, 1962 to on or about July 12, 1962, to commit offenses against the United States, namely, the acceptance of money by petitioner and Tryon with the intention of having their decisions influenced with regard to matters coming before them in their official capacities as employees of the United States, in violation of 18 U.S.C. §202, and acceptance by them of compensation for services rendered with respect to matters in which the United States had an interest, pending before an agency of the United States contrary to the provisions of 18 U.S.C. §281. Count II charged petitioner and Tryon with having actually committed the substantive offense proscribed by Section 202, in which they were aided and abetted by Schaeffer in violation of 18 U.S.C. §2. Count III similarly charged an actual violation of the offense described in Section 281.

Petitioner, at the time of his arrest on July 12, 1962, was Director, Production Engineering Department for the United States Army Signal Material Support Agency (USASMSA), at Fort Monmouth, N. J., having jurisdiction over some 450 employees, including about 103 supervisory personnel. (Laverick (38) 15-17) Tryon was Chief, Logistics Engineering Division, Maintenance Engineering

Department, USASMSA, Fort Monmouth, N. J. (Tryon (38) 306-307) Schaeffer had been a manufacturer's representative for about four years and, prior to that time, had been employed for a ten year period at Fort Monmouth in the Maintenance Engineering Department. In March, 1962, he was retained as the East Coast representative of Consad, Inc., Monterey Park, California, by its president Robert S. Snoyer. (Schaeffer (38) 157-160).

This case initiated on the night of June 7, 1962, when Snoyer, encouraged and accompanied by Charles Nicodemus, Washington reporter for the Chicago Daily News,[3] appeared before the F.B.I. in Washington, D. C., to report a possible bribe solicitation made the previous day by Schaeffer. (Snoyer (36) 168, 227, 230, 234, 239) Snoyer became quite disturbed over this Washington meeting, lasting five hours; he felt very roughly and rudely treated by the F.B.I. agents; he was not accustomed to being looked at in that manner and harshly interrogated with repeated warnings that he could be prosecuted if any of his statements were untrue; he felt pushed around, upset, alone and unsure of himself. (Snoyer (36) 284, 287-288, 351) He was called the next morning at 8 a.m., five hours after

[3]Snoyer became acquainted with him through several telephone calls from Nicodemus in May, 1962, during which he learned that Nicodemus, acting as the press' "watchdog," was investigating improper procurement practices,, and was dedicated to the improvement of opportunity of small contractors to obtain Government business. (Snoyer (36) 169-173) Snoyer told him that in eighteen years of experience he never encountered dishonesty by government officials at any level in the awarding of contracts and believed there were too many controls for it to occur. Nicodemus insisted however that "these things" occur, and he "confided instances" of "suspected" dishonesty. Snoyer thereupon became "instilled" with a growing suspicion as to procedures whereby Government contracts could be obtained. Nicodemus further said that should Snoyer ever see any evidence of such "things" going on, he wanted to know about it. (Snoyer (36) 176, 178-182, 233)

the meeting ended, and told to return to the F.B.I. to correct and sign the prepared statement, but, still badly shaken, he refused to sign. (Snoyer (36) 280-282) Also in the morning of June 8, Snoyer met with Justice Department personnel who instructed him to return to Los Angeles where he would be contacted by F.B.I. agents from that area. (Pet. 35a).

Snoyer returned to California, was contacted on Sunday, June 10, and met with F.B.I. agents on June 11 at their regional office in Santa Monica. (Pet 35a-36a) During this meeting the agents suggested they could record telephone calls with Schaeffer and Snoyer "allowed how that was a very fine idea." (Pet 37a) Pursuant to arrangements, Snoyer was always away from the office whenever a call came in, and Schaeffer was requested to leave a number where he could be reached.

Two calls were reecived on June 14, and, in each instance, Snoyer, following F.B.I. instructions, reported to the Santa Monica office to return the call. (Pet 38a; Snoyer (36) 338) Because of Snoyer's dissatisfaction with the distance involved, the F.B.I. rented an apartment across the street from his office from where all subsequent calls were made and taped through the same procedure. (Snoyer (36) 352-354, 368) The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H. A single pair of wires were attached to the incoming telephone pair at the connector block in the baseboard in the apartment and was connected to the "bridge" of the amplifier. This connecting block was located on the baseboard of the room in which the telephone was located and was about nine

feet from the telephone. (Appendix B, *infra*). A headset was attached to the tape recorder through which the agent could listen. This same procedure was used for all calls. (Colby (37) 2)

Fifteen telephone calls were recorded of which thirteen were overheard through the headset by an agent. These calls took place on June 14, 18, 19, 20, 21, 29, and July 2, 5, 9 and 11 of 1962. Except for one call to petitioner and one call to Tryon, each on June 20, both of which were taped, the remaining calls were to Schaeffer. (Colby (37) 2-3, 15). None of the telephone calls were overheard and recorded by the F.B.I. with the knowledge or consent of petitioner, Tryon or Schaeffer. All of the recordings were made with Snoyer's cooperation.

At the completion of the first call on June 14, the procedure followed then and generally thereafter was that Snoyer was given a paper to sign and upon which he wrote that he had given the agents permission to record the call; there was no discussion between them as to the contents of the call; the tape was not played back for Snoyer but was put in a tin can and kept in the possession of the F.B.I.; and Snoyer never heard the tapes played until November, 1963, when the trial was originally scheduled to get underway. (Snoyer (36) 334-337)

The overwhelming evidence supporting the alleged conspiracy and substantive charges was contained in the fifteen telephone conversations. On direct examination government witness Snoyer was asked and testified only to the "substance" of these fifteen conversations, para-

phrasing in damaging particulars.[4] (Snoyer (36) 30-58) The only direct testimony by Snoyer concerning F.B.I. participation in the phone calls occurred when he was asked what happened after he withdrew money from the bank, and he stated, "I went back to the apartment where the F.B.I. and I had been making these phone calls and gave this to them and they recorded the serial numbers." (Snoyer (36) 65) Snoyer, on cross-examination by Schaeffer's counsel, admitted that the phone calls had been intercepted as aforesaid. (Pet 36a - 37a; Snoyer (36) 370)

During the course of cross-examination Snoyer resumed the witness stand with typewritten transcripts of the fifteen intercepted calls. These transcripts had been prepared by the F.B.I. at some unspecified date, and were supplied to Snoyer by government counsel after court recess the prior evening. (Snoyer (36) 368-369) As cross-examination progressed, Snoyer would ask for and, over objections of counsel, was permitted to use the transcripts "to refresh his recollection" and to give testimony prejudicial to petitioner and his co-defendants; permission was likewise granted where government counsel objected to certain cross-examination unless Snoyer be allowed to use the transcripts to refresh recollection. (Snoyer (36) 371-376, 498-500, 506-507)

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[4]For example, regarding his call to Tryon on June 20, Snoyer testified (Snoyer (36) 39): As I recall it, I outlined to him the discussions we had had on these contracts and asked him whether I could really accept what Mr. Schaeffer was telling me as being factual. And he said, "Yes, you certainly can." And I said, "Well, can I accept these words that Mr. Laverick will truly do what he promised to do?" *I am paraphrasing to an extent now, you understand.* He said, "Well, why don't you call Bill directly and find out from him for yourself?" And so I called Mr. Laverick. (Emphasis added)

Subsequent to the Snoyer testimony, government witness William Colby, an F.B.I. agent, testified that he "participated" in the two telephone calls of June 20, 1962 made by Snoyer to Tryon and petitioner, in that he overheard such conversations by means of a headset connected to the tape recorder. (Colby (37) 2) Colby, over objections of defense counsel (Colby (37) 3-6, 9-13, 16), was permitted to read the two transcripts he had prepared of the conversations into evidence. Before starting, however, the agent stated that he had made certain corrections to the transcript; he had recently listened to the tapes and corrected anything that may have been in error, but all copies of the transcript had not been changed. The trial judge ruled that in view of the agent's recheck of the recordings, it would be best for him to read the corrected "accurate verbatim statement." (Colby (37) 19-21, 30-31) Accordingly, such prejudicial testimony was read into evidence. (Colby (37) 21 et seq.)

Petitioner, Tryon and Schaeffer each testified in their own defense. Government counsel extensively cross examined petitioner and Tryon with the transcripts of the recorded call each had with Snoyer. (Laverick (38) 71-76; Tryon (37) 381-392)

At the close of all the evidence, the trial judge charged the jury that it must determine the credibility of the witnesses in resolving the "sharp conflict in the testimony." (Pet 110a) In this regard the court reviewed certain of the testimony and the jury were reminded that there was "a series of telephone conversations" between Schaeffer and Snoyer "which were recorded by the F.B.I." The jury was further instructed that there "was also one telephone conversation between Mr. Snoyer and Mr. La-

verick which was recorded and one telephone conversation between Mr. Snoyer and Mr. Tryon which was recorded". (Pet 105a)

Petitioner, on July 20, 1962, received a notice of dismissal from his position at Fort Monmouth, where he had been employed since March, 1941, starting as a Junior Engineers. (Laverick (38) 15-16) He has been sentenced to prison for two years on Count I, and placed on two years probation each on Counts II and III, commencing at the completion of his prison sentence. (Pet 5a)

## REASONS FOR GRANTING THE WRIT

1. The ruling of the trial judge allowing testimony by Agent Colby (and Snoyer) concerning the existence of and reading into evidence the transcripts of recorded telephone conversations involves important questions of statutory construction in the administration of Section 605 of the Federal Communications Act, Appendix A, *infra*. Such testimony was ruled admissible under the authority of *Rathbun* v. *United States*, 355 US 107. (Colby (37) 13-14) This, it is submitted, constitutes a misapplication and significantly improper extension of the Court's holding on this troublesome and recurring issue.

In *Rathbun*, the Court held admissible the testimony of police officers as to the contents of a telephone conversation they overheard, at the invitation and with the consent of the receiving party, on a regularly used telephone extension. In reaching its decision the Court noted the dispute in the lower courts as to *what* constitutes an unauthorized interception (p. 109, fns 4 and 5), but held that on the facts "in the case before us", there has been

no interception within the meaning of Section 605. The issue so carefully framed by the Court appears to have been limited to situations involving overhearing on a "normally used extension phone". Notwithstanding such limited phraseology, *Rathbun* has been extended to support admission into evidence of a recording of a conversation, obtained by means of an attachment to the extension phone specially installed as an aid to the eavesdropping. *Ferguson* v. *United States*, 307 F 2d 787 (CA 10)[6]; see also *Carnes* v. *United States*, 295 F 2d 598 (CA 5).

The trial court's ruling below goes far beyond the *Ferguson* extension of *Rathbun*. Here, rather than being attached to the extension phone, the recording equipment was wired to the "connector block" at the baseboard of the apartment, some nine feet from the telephone, and the headset, through which the agent overheard the conversations, was attached to the recorder. This differs significantly from the facts in *Rathbun*. And although the agent here overhear the conversations, he was permitted to read the transcripts of the recordings because he was not able to relate the conversations verbatim without the use of such transcripts. (Colby (37) 17-18)

Clarification by the Court is needed also on the equally troublesome and related question as to who is a "sender" within the meaning of Section 605, capable of authorizing an interception. The trial judge here in effect held that Snoyer, who placed the calls for the purpose

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[6]In support of its holding, the court in *Ferguson* relied upon certain "fundamental concepts" created by *Goldman* v. *United States*, 316 US 129; *Olmstead* v. *United States*, 277 US 438; and *On Lee* v. *United States*, 343 US 747, the vitality of which cases seem to have been dissipated by more recent decisions of the Court. *Lopez* v. *United States*, 373 US 427 (Brennen, J., dissenting).

of attempting to draw incriminating statements from petitioner, Tryon and Schaeffer, was the sender who could give the necessary consent. The lower courts, as it has already been noted (see also *Carnes, supra*, pp. 600-601) are divided on this question. Although it does not appear to have been directly decided by the Court, the *Rathbun* case again has been interpreted as holding that either party may give the necessary consent. In *Carnes, supra*, involving recordings of telephone conversations obtained through an attachment to the earpiece of the telephone, the court, relying on *Rathbun*, explained that "the Supreme Court scotched the theory that the consent of each party to a conversation must be obtained before a communication may be divulged" (p. 601). This conclusion, based upon dicta, clearly is unjustified and is read out of context. The Court in *Rathbun*, as we have seen, was careful to limit its decision to conversations overheard on a regularly used extension telephone. While observing that either party may record the communication and publish it, the Court went on to explain that when one uses the telephone in the normal manner, he impliedly, if not expressly, consents to such divulgence. He "takes the risk that the other party may have an extension telephone and may allow another to ovearhear the conversation" (pp 110,111). Thus, contrary to the interpretation in *Carnes*, it appears that *Rathbun* holds that each party to a telephone conversation is both a "sender" and receiver, who, while engaged in the normal usage of a telephone, impliedly, if not expressly, consents to the divulgence of the conversation by the other party, or by one on his behalf; in the absence of such normal usage, such as where there is an interception, the express consent of each such party would be required for divulgence. Under the facts of the

present case, there was no such normal usage and the necessary consent was missing.[7]

2. The purposes for which the agent was permitted to read into evidence the transcripts of the recorded conversations, and the use made of such transcripts by Snoyer on cross-examination, are not constitutionally permissible and this Court, consequently, should exercise its supervisory powers to insure the fair administration of criminal justice herein.

This case, in principle, is indistinguishable from *On Lee* v. *United States*, 343 US 747, which although not yet overruled, has been roundly condemned. *Lopez* v. *United* States, 373 US 427 (Warren, C.J. concurring, p. 441; Brennen, J. dissenting, p. 446 et seq.). In *On Lee*, the government, faced with unreliable testimony of an alleged accomplice, equipped one Chin Poy, a former employee and friend of On Lee, with a concealed transmitter and sent him into On Lee's laundry to engage in conversation for the purpose of eliciting admissions that On Lee was part of an opium syndicate. At the trial, instead of calling Chin Poy to testify, the government put on the narcotics agent who was on the receiving end of the radio contact to testify to the admissions made by On Lee, testimony that led directly to conviction.

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[7]Assuming arguendo that the consent of only one party is sufficient, it is indeed questionable whether consent was voluntarily given. The alleged consent here was first given at a time when Snoyer admittedly was still "badly shaken" following his meeting with the F. B. I. in Washington, where he was roughly and rudely treated, was upset and unsure of himself, and was repeatedly threatened with prosecution in the event any of his statements to the F. B. I. were untrue. Consent given under such circumstances does not appear to be the voluntary consent required under the statute, but a forced consent of the type condemned by this Court in *Weiss* v. *United States*, 308 US 321, 329-331.

There was one minor difference between the facts of this case and *On Lee*. Snoyer, unlike Chin Poy, did testify, although his testimony at the express directions of government counsel was limited merely to the "substance" of the fifteen telephone conversations, some of which he paraphrased in damaging particulars. Snoyer thereafter, was subjected to extensive cross-examination which raised reasonable doubts as to the guilt of petitioner[8] and his alleged co-conspirators. However, similar to *On Lee*, the government then called F.B.I. agent Colby to read into evidence the transcripts of the recorded conversations of Snoyer with petitioner and Tryon. This evidence by the agent constituted "a vital part of the prosecutor's proof" (*Nardone* v. *United States* 302 US 379, 380), and, unlike the situation in *Lopez* v. *United States, supra*, was not used by the government to corroborate the testimony of Snoyer, but rather, to obviate the need to have Snoyer, the instigating party to the calls, testify with specificity as to the telephone conversation.[9] Indeed, government counsel was careful to avoid having Snoyer even testify on direct examination that such conversations had been intercepted

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[8]Despite Snoyer's testimony as to petitioner's guilty conduct, the government's own evidence revealed that on June 22, 1962, two days *after* the telephone call by Snoyer to petitioner, the petitioner, contrary to Snoyer's testimony of petitioner's intentions, made absolutely no attempt to "overrule" any of his subordinates, and, in fact, had continued his prior recommendation of rejection of Snoyer's corporation for a government contract, as evidenced by the Technical Ability Evaluation on Consad Corporation, dated June 18, 1962. (Govt 96b)

[9]Further unlike the *Lopez* case, involving the introduction in evidence of a wire recording which was concededly "an accurate version of a conversation" (p. 439), the versions of the conversations here were contained in transcripts prepared by the agent from the recordings. The government did not offer the recordings themselves. Subsequent to preparing the original transcripts, the agent rechecked the recordings and made various corrections to the transcripts, so that they would be an "accurate verbatim statement" of the subject conversations.

and recorded. The net result of this deliberate governmental tactic, permitted over objections of counsel (Colby (37) 10), was greatly prejudicial to petitioner, and in effect dignified what might have otherwise been suspect credibility of the main government witness as to other testimony.

Moreover, the government strategy here was even more unfair to petitioner than that in *On Lee*. Snoyer, on direct examination, alluded only to calls he and the F.B.I. had made to petitioner and his co-defendants, but on cross-examination admitted that all fifteen calls had been intercepted and recorded.[10] Subsequently, during continued cross-examination, he was supplied by government counsel with all fifteen transcripts allegedly for the purpose of refreshing his recollection. However, having armed Snoyer with such transcripts, in full view of the jury, the government was able to shift to the defense the onus of trying to impeach the witness with respect to the contents of such conversations, with the added danger, as actually became the case, of having damaging portions of such conversations brought out which overshadowed parts favorable to the defense. By the same token, the government in effect had the full benefit of the recordings of the Schaeffer conversations without having to introduce same.

Thus the government was able to radically shift the pattern of presentation of evidence in a criminal trial, thereby concealing substantial factual and legal issues

[10]Defense counsel had previously been advised by the government, out of the jury's presence, that such interceptions had been made and were allowed to hear the recordings in the court's chambers. It was counsel's understanding, however, that the government did not intend to use the recordings during the trial.

concerning the rights of the accused in the administration of criminal justice. Compare *Lopez* v. *United States, supra* (Warren, C.J., concurring, pp 441 et seq.)

3. The petitioner's right under the Fourth and Fifth Amendments to the Federal Constitution were violated by the ruling of the trial judge in allowing the F.B.I. agent, over objections, to read into evidence the transcripts of the telephone conversations which he prepared from the recordings of such telephone calls made without the knowledge or consent of petitioner or his co-defendants.

Such transcripts, whether "corrected" or as originally prepared by the agent, were the fruits of an illegal electronic surveillance which, though intangible, are nevertheless within the protectice sphere of the Fourth Amendment (*Irvine* v. *California*, 347 US 128), and as such were improperly allowed to be read into evidence. *Silverman* v. *United States*, 365 US 505. For this and other reasons of constitutional proportions discussed in the concurring and dissenting opinions in *Lopez* v. *United States, supra*, it is respectfully submitted that the Court should reverse the judgment of the courts below.

Again, as in the past *(Silverman*, p. 508), it is respectfully submitted that the Court should reconsider its decisions in *Olmstead*, *Goldman*, and *On Lee*, or at least re-examine them so as to clearly outline for the courts and citizenry the protective spheres of the Fourth and Fifth Amendments in this age of electronic marvels. It seems safe to say that the "frightening paraphenalia" referred to in *Silverman* (pp 508-509), may today be out-

moded[11], and the need for the Court to speak out on the continued vicious infringement of one's Constitutional rights is greater than ever.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

GEORGE ELIAS, JR.
Counsel for Petitioner
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Miami, Florida 33130

[11]See e.g., "Invasion of Privacy (Government Agencies)", Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, presently being carried on.

## APPENDIX A

## CONSTITUTION AND STATUTES INVOLVED

### UNITED STATES CONSTITUTION

### AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### STATUTES

Title 47, United States Code
Section 605

* * * [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such in-

tercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *. [48 Stat. 1103]

## APPENDIX B

## IN THE
## SUPREME COURT OF THE UNITED STATES

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October Term, 1965

WILLIAM J. LAVERICK,

Petitioner

v.

UNITED STATES OF AMERICA

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BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally appeared GEORGE ELIAS, JR., who, after being first duly sworn, deposes and says:

That he has been retained as counsel for Petitioner for the purpose of preparing and filing a petition for writ of certorari in the matter designated as William J. Laverick, Petitioner, v. United States of America, October Term 1965, No. _____.

That following an examination of the record below, and consultations with defense counsel below and the office of the United States Attorney for the District of New Jersey, it appears that no stenographic report was made of the evidence concerning the manner, procedure and type of electronic or mechanical equipment used by agents of the Federal Bureau of Investigation to tape record certain telephone conversation during the period

of June 14, 1962 through July 11, 1962, between Robert S. Snoyer and the defendants-appellants in the courts below: William J. Laverick, Harrison F. Tryon, and Malcolm Schaeffer *(United States of America, Plaintiff,* v. *William J. Laverick, et al, Defendants,* District of New Jersey, Criminal #537-62), the transcripts of some of which recorded conversations were read into evidence on behalf of the Government. However, the office of the United States Attorney advised affiant that evidence relative to the manner, procedure and type of equipment used is contained in the "Statement of Facts" of the MEMORANDUM OF LAW submitted by the Government in support of admissibility of such evidence during the trial of this cause, and filed with the Honorable Robert Shaw, United States District Judge for the District of New Jersey, the contents of which "Statement" were thereafter relied upon by the defendants in their MEMORANDUM OF LAW in opposition thereto which reads as follows:

## STATEMENT OF FACTS

This case was initiated when Robert S. Snoyer voluntarily gave a statement to the F.B.I. in Washington on June 8, 1962. As a result of this statement, arrangements were made to record conversations which he had with the defendants in the case at bar. The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H.

A single pair of wires were attached to the incoming telephone pair at the connector block in the baseboard in the apartment and was connected to the "bridge" of the amplifier. This connecting block is located on the base-

board of the room in which the telephone is located and is about nine feet from it.

Recordings were made of conversations between Snoyer and Schaeffer, Snoyer and Laverick; and Snoyer and Tryon. All of these recordings were made with Snoyer's full knowledge, cooperation and consent.

George Elias, Jr.

George Elias, Jr.
Attorney for Petitioner
12th Floor, Concord Building
Miami, Florida 33130

SWORN to and subscribed before me this 10 day of September, 1965.

Notary Public

My Commission expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES JULY. 23, 1967
BONDED THROUGH FRED W. DIESTELHORST

## APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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Nos. 14874, 14875 AND 14876

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UNITED STATES OF AMERICA

*v.*

WILLIAM J. LAVERICK,
HARRISON F. TRYON AND
MALCOLM SCHAEFFER.

WILLIAM J. LAVERICK,
Appellant in No. 14874

HARRISON F. TRYON,
Appellant in No. 14875

MALCOLM SCHAEFFER,
Appellant in No. 14876

Appeals From the United States District Court for the District of New Jersey

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Argued November 19, 1964

Before STALEY, GANEY and FREEDMAN,
*Circuit Judges.*

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## OPINION OF THE COURT

(Filed July 15, 1965)

By GANEY, *Circuit Judge.*

This Consolidated appeal comes before the Court for review of the conviction of three defendants under Sections 2, 202, 281 and 371 of Title 18, United States Code.[1]

The parties involved are defendant, William J. Laverick, a former Government employee, in charge of a department at Fort Monmouth, New Jersey, whose responsibility it was to certify the technical ability and plant capacity of firms bidding on Signal Corps' contracts and to approve any technical changes in contract specifications. The approval of this department was a prerequisite to receiving an award. Defendant, Harrison F. Tryon, was chief of the Logistics Engineering Division at Fort Monmouth and was a direct subordinate of Laverick's, as well as the custodian of lists containing the specifications of all component parts used in these contracts. Defendant, Malcolm Schaeffer, was a former employee of Laverick's department and later a manufacturer's representative of

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[1]The relevant provisions are as follows:

§ 2 Title 18 U.S.C. provides that one who aids or abets the commission of a crime is guilty as a principal.

§ 202 Title 18 U.S.C. proscribes the receipt of money by an employee of the United States with the intent to have his decision influenced with regard to a matter before him in his official capacity.

§ 281 Title 18 U.S.C. punishes an employee of the United States who accepts compensation for services which he renders in relation to a matter in which the United States has an interest, before an agency of the United States.

§ 371 Title 18 U.S.C. prohibits any conspiracy to commit an offense against the United States.

Consad, Inc., in their attempts to secure contracts with the Government at Fort Monmouth, New Jersey, from March through May 26, 1962, when a retainer of $250 per month was cancelled, but nevertheless, Consad continued getting in touch with him thereafter. Consad, Inc., was an electronic components manufacturer which had, at the time of the alleged crime, a series of bids pending before the Signal Corps at Fort Monmouth, New Jersey. Consad, Inc., had experienced great difficulty in obtaining Government contracts because of its inability to convince the Signal Corps of its capacity to manufacture the finished product.

The facts, briefly stated, are as follows:

Robert Snoyer was president of Consad, Inc., and on June 6, 1962, was in New York City when he received a wire from his office in Santa Monica, California, concerning a certain bid his company then had pending at Fort Monmouth, New Jersey. In order to obtain the requested information, Snoyer attempted to get in touch with his Santa Monica plant, as well as his Monterey plant in California, but was unable to find anyone at either place who could give him the requisite information. He then called the defendant, Schaeffer, at Fort Monmouth, and told him of the wire he had received, and asked him to check into the matter and see if he could identify the equipment. Schaeffer called back, identifying the equipment, which had an established value of approximately $2,500,000, and Schaeffer indicated that Snoyer would have the same difficulty he had had in the past with the people at Fort Monmouth, and told him that if he hoped to obtain any business, he would need the help of certain people at Fort Monmouth, and that for a fee of 2% of the contract price he could expect to receive all the approvals necessary to

obtain the contract. Snoyer told him that he would want to meet the principals involved who could deliver the contracts and the approvals. Schaeffer told Snoyer that he would come to New York the next morning and he would introduce him to Laverick who was the one who could be most helpful in securing the contract. Schaeffer came to New York on June 7, 1962, and he and Snoyer drove down to Laverick's home and there Snoyer asked Laverick to confirm Schaeffer's statement that what he told him was true and Laverick replied, indicating Schaeffer, "You do what Muggsy tells you to do and everything will be O.K. . . ." To this, Snoyer answered, "All right." Later, when they were about to leave, Snoyer being somewhat doubtful about the money concerned, since on the way down to Laverick's home Schaeffer had reduced the price from 2% of $2,500,000, or $48,000.00, to $20,000.00 as the amount of the payment, and therefore asked Schaffer whether Laverick knew about this and was still willing to go through with the deal. Schaeffer thereupon walked apart from Snoyer and whispered something to Laverick which Snoyer testified he could not overhear, but that he heard Laverick's reply, "Yes, you're damn right I will.", and Schaeffer, upon returning to Snoyer, came back and said, "You heard him, so everything is O.K."

Schaffer then drove Snoyer to Philadelphia, and on the way over, he advised Snoyer to call him the next day and he would tell him what he had to do in California, in order to pass the survey which was necessary for the approval of the contract. Schaeffer and Snoyer also had a discussion on how the tax problem on the money to be paid should be avoided and Schaeffer advised Snoyer that it would be necessary for him to take care of his (Schaeffer's) taxes, inasmuch as Schaeffer insisted that the money

was to be paid directly to him and he would make the proper disposition thereof.

From Philadelphia, Snoyer proceeded to Washington, where he confided what had transpired to one Nicodemus, a newspaper reporter, who had been making a study of procurement orders, who told him to contact the F.B.I., which Snoyer did, and, after five hours discussion with the F.B.I., Snoyer left for California, without signing any statement of the conversation which had ensued.

Snoyer called the next day and was told by Schaeffer that he was sending some documents to him which would be very helpful for the company when the survey team came from Fort Monmouth and arrived at Consad's plant. After Snoyer's arrival in California, he was contacted by the F.B.I. of Los Angeles, and he reported to them that he had received a package from Schaeffer which he brought to the Santa Monica office of the F.B.I. and it was found to contain some provisioning lists and item description lists taken from Signal Corps' files. Further testimony showed that these lists were not open to the public, were confidential, and were given to the defendant, Laverick, by the defendant, Tryon ,through Tryon's secretary.

After the receipt of these documents by Consad in California, which were sent by Schaeffer and taken to the offiice of the F.B.I., a series of telephone conversations were had between Schaeffer and Snoyer, which were recorded by the F.B.I., as well as telephone conversations between Snoyer and Laverick and Snoyer and Tryon. These conversations occurred between June 14th and July 11th, and during one such conversation between Schaeffer and Snoyer, Schaeffer advised Snoyer that he should bring

East with him between $4,500.00 and $5,000.00 in cash to be paid by Schaeffer to four people at Fort Monmouth. Snoyer, however, wanted to meet the principals to whom the money was to be paid and Schaeffer was unwilling, saying that he would distribute the same. However, Snoyer withdrew $3,000.00 from the bank and came East with Agent Stein of the F.B.I., the money being identified at the Newark office of the F.B.I., and placed in envelopes, one of which contained an amount of $850.00, the other $750.00. The testimony shows that the F.B.I. gave no instructions to Snoyer other than he was not to give the envelope containing the money to anyone unless the one receiving it knew it was money and that there was some basis for the payment of it.

Between June 8th, and June 12th, a survey team, under one Mayerson, visited the Consad plant in California, and made a technical ability evaluation to determine whether it could technically produce the equipment upon which it had bid. A report was filed by the survey team, under Mayerson, stating that Consad was not qualified, and Laverick, though he had authority to overrule the report, did not so do. Snoyer, at this time was unaware of this conduct on Laverick's part. The Contractor Evaluation Board, the highest authority with respect to contracts of this nature, also approved the report. Later, Snoyer, upon learning of the unfavorable report which the survey team had made, was assured on or about June 15th, by Schaeffer that certain of the information of the survey team was in error and told Snoyer, "Well, don't worry about that because Bill will overrule them. Don't concern yourself with it." He also advised Snoyer that there were various details that were wrong with Consad's facilities and that was the reason they could not give technical approval, but

Schaeffer again assured Snoyer, ". . . that these people would be overruled."

An F.B.I. Agent, Colby, testified to a telephone conversation between Snoyer and Tryon on June 20th, in which Tryon stated he was familiar with the entire matter and that he would be able to help Consad after the award was made and that he had already helped, to some extent, with Schaeffer. On July 12, 1962, arrangements were made by Schaeffer for Snoyer to have dinner at the Shadow-Brook Restaurant in Shrewsbury, New Jersey, with Tryon and Laverick and other Fort Monmouth personnel. Snoyer testified, however, that at this meeting Laverick assured Snoyer that the Small Business Administration, which had authority to overrule everything which had gone on before, would grant Consad a Certificate of Competency. He, additionally, assured Snoyer that he was helping all he could with Consad, as was Tryon, and when they had secured the contract, he would make it profitable by ordering spare parts. Snoyer testified that out of the presence of the other persons, he showed Schaeffer the cash he had brought by exhibiting the envelopes containing the cash to him. Schaeffer, likewise, knew at this meeting that the survey team had reported that Consad was technically unqualified to perform the work under their bid. Later in the evening at the Shadow-Brook Restaurant, when Snoyer visited the men's room with Laverick, upon leaving he handed one of the envelopes to Laverick which contained the cash and asked him if he thought he deserved it and Laverick said, "Yes." Later, Snoyer took the defendant, Tryon, aside in the bar, showed him the envelope with the money in it and asked him if he thought he deserved it and he answered, "Yes." Snoyer than gave the envelope to him and Tryon folded it and put it in his pocket. Imme-

diately upon defendants leaving the restaurant, they were arrested which, as has been indicated, was on July 12, 1962.

This evidence was presented to the jury, the defendants moved for judgments of acquittal after the Government's case and also after their own case had been presented and both of these motions were denied. After summation of counsel, the case was submitted to the jury which rendered a verdict for the Government and against all three defendants. A motion for a new trial was denied on February 26, 1964, and this appeal followed.

The first reason advanced by the defendants for the new trial is that the charge of the court on entrapment was improper because (1) it did not make any reference as to whether or not there was any "predisposition" on the part of the defendants to commit the crime charged; (2) that the charge of the court with respect to Snoyer being a Government agent was insufficient, and, finally, that the court's use of the phrases "lawful entrapment" and "unlawful entrapment" was prejudicial to the defendant.

At the outset, it may be stated that a careful review of the record indicates plainly that there was no necessity for the court to charge with respect to entrapment. The record clearly shows that the unlawful scheme was conceived in the minds of the defendants, Schaeffer and Laverick, and materially aided by Tryon, and presented to Snoyer, and that everything thereafter done by Snoyer, in cooperation with the F.B.I. agents, was only taking advantage of an opportunity for wrongdoing that they presented and afforded.

While defendants, in their argument and brief, admitted that they do not set out effectively their objection to the court's charge on entrapment, they now assert that the court was in error in not using the specific word "predisposition" in setting forth the requisite state of mind that should obtain on the part of the defendants in any case of entrapment. However, it is plain that the trial court, in explaining the law of entrapment to the jury, was not bound to use any specific word and, while the court did not mention "predisposition", it did use phrases such as "implants in the mind of an otherwise innocent person", "already disposed . . .", as well as "already has the readiness and willingness to break the law", and similar phrases synonymous therewith. It is obvious that these phrases throughout the court's charge were interchangeable with the specific word "predisposition".

Furthermore, the court stated as follows:

> "You are instructed that entrapment is present when the criminal design originates with an officer or agent of the Government and he implants in the mind of an otherwise innocent person the disposition to commit the offense and induces its commission in order to create the grounds for prosecution. You are further instructed that entrapment is not present when the criminal intent originates in the mind of a person already disposed to the commission of an offense, and the officer or agent of the Government does nothing more than afford that person the opportunity to commit the offense."

Furthermore,

> "By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by a law enforcement officer to commit a crime, he is entitled to the defense of unlawful entrapment because, as I have mentioned, the law as a matter of public policy forbids a conviction in such a case, but on the other hand if a person already has the readiness and willingness to break the law, the mere fact that Government agents provided a favorable opportunity is no defense. This is lawful entrapment."

With respect to the second assertion that the charge with respect to Snoyer being a Government agent was insufficient, it is likewise without foundation. It is obvious that a private individual may only be an entrapping party when an agency relationship exists between himself and the Government. The record herein displays no evidence to support any agency relationship between the Government and Snoyer at the time of the formation of the nefarious scheme and the court's detailed charge, concerning when entrapment is perpetrated by an officer or agent of the Government, was as full and complete as the record warranted. Additionally, a long and intensive cross-examination of Snoyer by defense counsel elicited nothing which could possibly be construed as making Snoyer a Government agent in any entrapment proceeding. This for the reason that Snoyer had no relationship with any Gov-

ernment official until after Schaeffer solicited the payment of money to him, and it is uncontradicted that Schaeffer arranged the meeting with Laverick at his home at which time the plan was perfected and which Tryon later on materially aided.

With respect to the third contention, while the adjectives "unlawful" and "lawful" entrapment might have been somewhat of an over-portrayal in describing the conditions requisite for entrapment, nevertheless, the thought clearly and carefully embodies that which is necessary and proper under the law. *Sherman v. United States*, 356 U.S. 369; *Accardi v. United States*, 257 F. 2d 168; *Park v. United States*, 238 F. 2d 253; *United States v. Romano*, 278 F. 2d 202. Accordingly, it is obvious that the phrases "lawful entrapment" and "unlawful entrapment" comport with the language used by many appellate courts in describing entrapment and the trial court's charge with respect thereto was clear and sufficient.

The basis for the defendant's averment of entrapment, as has been indicated, is that Snoyer sought to lure the defendants into the wrongdoing in order to justify Consad's lack of success in obtaining the Government contracts. All of the facts, as we shall point out in connection therewith, were before the jury and Snoyer vigorously denied any assertion of allurement on his part, or that the telephone calls in July, previously adverted to, were designed with any thought of entrapment. These telephone conversations, in their entirety, show beyond a doubt that they belie any theory of entrapment on the part of Snoyer as a Government agent, but clearly point up only part of strategem used to afford an opportunity for all of the three defendants to carry out their scheme of wrongdoing. As has

been indicated above, the nefarious scheme was broached and implanted in Snoyer's mind by the defendant, Schaeffer, on June 6, 1962, when he stated that for a fee of 2% of the contract price, Snoyer could expect to receive the favorable approval at Monmouth which was necessary to the securance of the contract, all of which was aided and abetted by Laverick and Tryon, as herein indicated, and, accordingly, it cannot be reiterated too often that all the F.B.I. did was to afford an opportunity through Snoyer for the defendants to commit the crime charged.

Another argument advanced by the defendant is that the charge of the court, in its summary, was one-sided and emphasized the Government's case to the exclusion of the defendant's case. Here, there was no objection to the court's charge with respect thereto at the close of the case and whatever warrant there is to this assertion must be found under the Plain Error Rule of Rule 30. There was denial by the defendants of all the allegations of the Government's witnesses and the contentions of both parties were properly laid before the jury, and a careful scrutiny of the record shows no prejudice in the court's charge, for it is abundantly clear that the court lent equal weight to both the evidence produced by the Government, as well as that produced by the defendants.

The next objection raised by the defendant is that the court permitted certain questions to be addressed to the defendant, Laverick, which were prejudicial to him before the jury. One of the objected areas involved the cross-examination of Laverick with respect to his savings account and investments, while the other dealt with his ownership of a race horse. However a reading of the record shows that on direct-examination Laverick was questioned

as to his financial situation and opened the door for the questions posed on cross-examination and were asked to test his credibility with respect to his financial situation and, accordingly, proper. The facts in this case pose nothing of the situation presented in *Berger v. United States*, 295 U.S. 78, at 84, where the Government exceeded the bounds of cross-examination in large measure by permitting to go to the jury incompetent hearsay evidence. There was ample basis here for the cross-examination involved. Again here, it was the defendant's own objection which prevented the Government from proving the allegations in connection with his large purchases of stock and a race horse and, accordingly, no prejudice resulted since the court, in its charge, said: "I further charge you that whenever the Court has sustained an objection to the question you may draw no inference from the wording of that question or speculate as to what the witness would have said if permitted to answer, nor can you assume that any party has objected to a question because that side expected the answer, if any, to be unfavorable." Accordingly, if any prejudice could have properly accrued to the defendant by this question, it was cured by the court's charge.

Finally, certain objections were raised as to the sufficiency of the indictment. However, an indictment should be construed broadly in favor of the Government after a verdict has been rendered thereon. *Hagner v. United States*, 285 U.S. 427, at 431. This rule is particularly applicable here where the defendant made no specific objection to the indictment by means of any pre-trial motion. However, objection is urged to the indictment here that it was insufficient, in that each count in Count I and II alleged the statutory offense in the disjunctive or alter-

native. Here again, counsel is urging, for the first time, this specific objection. The cases are unanimous in holding that merely technical defects are waived when no objection is made to them at trial. Rule 12(b) (2). What is really here adverted to is that the indictment is duplicitous, to which the Government answered that there is, in fact, no duplicity, nor did any ever exist, as there is no danger in the allegations that a conviction or acquittal of the defendants would fail to bar a subsequent criminal prosecution on the grounds of double jeopardy. The essence of the crime here charged is the receiving of the money, not the quid pro quo received or promised for that money, and where the statutes use the disjunctive to described the alternate means of committing the same statutory offense and only one crime is charged, the means of commission are permissible. *United States v. Johnson*, 207 F. 2d 314.

The other reasons asserted for a new trial are without merit.

The judgment of the District Court will be affirmed.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 563

MALCOLM SCHAEFFER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. _____

MALCOLM SCHAEFFER,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Malcolm Schaeffer, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 15, 1965.

### Opinion Below

The opinion of the court below (*infra* Appendix A, pp. 1a to 14a) has not yet been reported.

### Jurisdiction

The judgment of the Court of Appeals was entered on July 15, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

## Questions Presented

1. Whether it was prejudicial error for the Trial Judge during his instructions to the jury to recapitulate and emphasize the testimony of the principal witness produced by the Government.

2. Where a vital issue at the trial is the defense of entrapment, was it prejudicial error for the Court to charge that the law recognized lawful and unlawful entrapment?

## Constitutional Provisions and Statutes Involved

1. The FIFTH AMENDMENT provides, *inter alia,* that—
No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process, of law; * * *

2. THE SIXTH AMENDMENT provides, *inter alia,* that—
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

3. TITLE 18, UNITED STATES CODE:

§2. *Principals*

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

4. TITLE 18, UNITED STATES CODE.

"201. *Bribery of public officials and witnesses*

(a) For the purpose of this section:
'public official' means Member of Congress, or Resident Commissioner, either before or after he

has qualified, or an officer or employee or person acting for on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

'person who has been selected to be a public official' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or

because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title. Added Pub.L. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1119."

5. TITLE 18, UNITED STATES CODE:

"§202. *Definitions*

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term 'special Government employee' shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, or a part-time United States Commissioner. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29 (c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U. S. C. 30r (c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Re-

serve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms 'officer or employee' and 'special Government employee' as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

(b) For the purposes of sections 205 and 207 of this title, the term 'official responsibility' means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action. Added Pub.L. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1121."

6. TITLE 18, UNITED STATES CODE:

§281. *Compensation to Members of Congress, officers and others in matters affecting the Government*

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, of-

ficer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress. As amended May 24, 1949, c. 139, §6, 63 Stat. 90."

7. TITLE 18, UNITED STATES CODE:

"§371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

## Statement

This is a criminal proceeding under Sections 2, 202, 281 and 371 of 18 U. S. C.

The parties involved are defendant, William J. Laverick, a former Government employee, in charge of a department at Fort Monmouth, New Jersey, whose responsibility it was to certify the technical ability and plant capacity of firms bidding on Signal Corps' contracts and to approve any technical changes in contract specifications. The approval of this department was a prerequisite to receiving an award. Defendant, Harrison F. Tryon, was chief of the Logistics Engineering Division at Fort Monmouth and was a direct subordinate of Laverick's, as well as the custodian of lists containing the specifications of all component parts used in these contracts. Defendant, Malcolm Schaeffer, was a former employee of Laverick's department and later a manufacturer's representative of Consad, Inc., in their attempts to secure contracts with the Government at Fort Monmouth, New Jersey, from March through May 26, 1962, when a retainer of $250.00 per month was cancelled, but nevertheless, Consad continued getting in touch with him thereafter. Consad, Inc. was an electronic components manufacturer which had, at the time of the alleged crime, a series of bids pending before the Signal Corps at Fort Monmouth, New Jersey. Consad, Inc. had experienced great difficulty in obtaining Government contracts because of its inability to convince the Signal Corps of its capacity to manufacture the finished product.

The facts, briefly stated, are as follows:

Robert Snoyer, the president of Consad, Inc., was the principal witness called by the Government. His testimony

was that on June 6, 1962 was in New York City when he received a wire from his office in Santa Monica, California concerning a certain bid his company then had pending at Fort Monmouth, New Jersey. In order to obtain the requested information, Snoyer attempted to get in touch with his Santa Monica plant, as well as his Monterey plant in California, but was unable to find anyone at either place who could give him the requisite information. He then called the defendant, Schaeffer, at Fort Monmouth, and told him of the wire he had received, and asked him to check into the matter and see if he could identify the equipment. Schaeffer called back, identifying the equipment, which had an established value of approximately $2,500,000, and Schaeffer indicated that Snoyer would have the same difficulty he had had in the past with the people at Fort Monmouth, and told him that if he hoped to obtain any business, he would need the help of certain people at Fort Monmouth, and that for a fee of 2% of the contract price he could expect to receive all the approvals necessary to obtain the contract. Snoyer told him that he would want to meet the principals involved who could deliver the contract and the approvals. Schaeffer told Snoyer that he would come to New York the next morning and he would introduce him to Laverick who was the one who could be most helpful in securing the contract. Schaeffer came to New York on June 7, 1962 and he and Snoyer drove down to Laverick's home and there Snoyer asked Laverick to confirm Schaeffer's statement that what he told him was true and Laverick replied, indicating Schaeffer, "You do what Muggsy tells you to do and everything will be O.K. * * *" To this, Snoyer answered, "All right." Later, when they were about to leave, Snoyer being somewhat doubtful about the money concerned, since on the way down to Laverick's

home Schaeffer had reduced the price from 2% of $2,500,000, or $48,000.00, to $20,000.00 as the amount of the payment, and thereafter asked Schaeffer whether Laverick knew about this and was still willing to go through with the deal. Schaeffer thereupon walked apart from Snoyer and whispered something to Laverick which Snoyer testified he could not overhear, but that he heard Laverick's reply, "Yes, you're damn right I will", and Schaeffer, upon returning to Snoyer came back and said, "You heard him, so everything is O.K."

Schaeffer then drove Snoyer to Philadelphia, and on the way over, he advised Snoyer to call him the next day and he would tell him what he had to do in California, in order to pass the survey which was necessary for the approval of the contract. Schaeffer and Snoyer also had a discussion on how the tax problem on the money to be paid should be avoided and Schaeffer advised Snoyer that it would be necessary for him to take care of his (Schaeffer's) taxes, inasmuch as Schaeffer insisted that the money was to be paid directly to him and he would make the proper disposition thereof.

From Philadelphia, Snoyer proceeded to Washington, where he related the above story to one Nicodemus, a newspaper reporter, who had been making a study of procurement orders, who told him to contact the F.B.I., which Snoyer did, and, after five hours discussion with the F.B.I., Snoyer left for California, without signing any statement of the conversation which had ensued.

Snoyer called the next day and was told by Schaeffer that he was sending some documents to him which would be very helpful for the company when the survey team came from Fort Monmouth and arrived at Consad's plant. After

Snoyer's arrival in California, he was contacted by the F.B.I. of Los Angeles, and he reported to them that he had received a package from Schaeffer which he brought to the Santa Monica office of the F.B.I. and it was found to contain some provisioning lists and item description lists taken from Signal Corps' files. Further testimony showed that these lists were not open to the public, were confidential, and were given to the defendant, Laverick, by the defendant, Tryon, through Tryon's secretary.

After the receipt of these documents by Consad in California, which were sent by Schaeffer and taken to the office of the F.B.I., a series of telephone conversations were had between Schaeffer and Snoyer, which were recorded by the F.B.I. as well as telephone conversations between Snoyer and Laverick and Snoyer and Tryon. These conversations occurred between June 14 and July 11, and during one such conversation between Schaeffer and Snoyer, Schaeffer advised Snoyer that he should bring East with him between $4,500.00 and $5,000.00 in cash to be paid by Schaeffer to four people at Fort Monmouth. Snoyer, however, wanted to meet the principals to whom the money was to be paid and Schaeffer was unwilling, saying that he would distribute the same. However, Snoyer withdrew $3,000.00 from the bank and came East with Agent Stein of the F.B.I., the money being identified at the Newark office of the F.B.I., and placed in envelopes, one of which contained an amount of $850.00, the other $750.00.

Between June 8 and June 12, a survey team, under one Mayerson, visited the Consad plant in California, and made a technical ability evaluation to determine whether it could technically produce the equipment upon which it had bid. A report was filed by the survey team, under

Mayerson, stating that Consad was not qualified, and Laverick though he had authority to overrule the report, did not do so. Snoyer, at this time, was unaware of this conduct on Laverick's part. The Contractor Evaluation Board, the highest authority with respect to contracts of this nature, also approved the report. Later, Snoyer, upon learning of the unfavorable report which the survey team had made, was assured on or about June 15, by Schaeffer that certain of the information of the survey team was in error and told Snoyer, "Well, don't worry about that because Bill will overrule them. Don't concern yourself with it." He also advised Snoyer that there were various details that were wrong with Consad's facilities and that was the reason they could not give technical approval, but Schaeffer again assured Snoyer, "* * * that these people would be overruled."

An F.B.I. Agent, Colby, testified to a telephone conversation between Snoyer and Tryon on June 20, in which Tryon stated he was familiar with the entire matter and that he would be able to help Consad after the award was made and that he had already helped, to some extent, with Schaeffer. On July 12, 1962 arrangements were made by Schaeffer for Snoyer to have dinner at the Shadow-Brook Restaurant in Shrewsbury, New Jersey with Tryon and Laverick and other Fort Monmouth personnel. Snoyer testified, however, that at this meeting Laverick assured Snoyer that the Small Business Administration, which had authority to overrule everything which had gone on before, would grant Consad a Certificate of Competency. He, additionally, assured Snoyer that he was helping all he could with Consad, as was Tryon, and when they had secured the contract, he would make it profitable by ordering

spare parts. Snoyer testified that out of the presence of the other persons, he showed Schaeffer the cash he had brought by exhibiting the envelopes containing the cash to him. Schaeffer, likewise, knew at this meeting that the survey team had reported that Consad was technically unqualified to perform the work under their bid. Later in the evening at the Shadow-Brook Restaurant, when Snoyer visited the men's room with Laverick, upon leaving he handed one of the envelopes to Laverick which contained the cash and asked him if he thought he deserved it and Laverick said, "Yes." Later, Snoyer took the defendant, Tryon, aside in the bar, showed him the envelope with the money in it and asked him if he thought he deserved it and he answered, "Yes." Snoyer then gave the envelope to him and Tryon folded it and put it in his pocket. Immediately upon defendants leaving the restaurant, they were arrested which, as has been indicated, was on July 12, 1962.

This evidence was presented to the jury, the defendants moved for judgments of acquittal after the Government's case and also after their own case had been presented and both of these motions were denied. After summation of counsel, the case was submitted to the jury which rendered a verdict for the Government and against all three defendants. A motion for a new trial was denied on February 26, 1964. Appeal was taken to the United States Court of Appeals for the Third Circuit and the judgments of the trial court were affirmed.

## Reasons for Granting the Writ

The questions presented by this case are major issues dealing with the administration of criminal justice in the Federal Courts. In essence, they involve the standards of fairness to be acknowledged as the responsibility of all parties in a federal criminal trial.

**1. The comment upon the evidence by the Court during the course of the instructions to the jury.**

This Court has previously spoken on the subject of the propriety of a trial judge commenting upon the evidence during the course of a criminal trial. In 1933, the Court decided *Quercia* v. *United States*, 289 U. S. 466 (1933) and *United States* v. *Murdock*, 290 U. S. 389 (1933). Those cases established a general rule which has been quoted at length ever since in appellate decisions throughout the country.

> "In a trial by jury in a Federal Court, the Judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

*Quercia* v. *United States*, 289 U. S. 466, 469 (1933); *United States* v. *Curzio*, 170 F. 2d 354, 357 (3rd Cir., 1948); *United States* v. *Rutkin*, 189 F. 2d 431, 440 (3rd Cir., 1951); affirmed on other grounds 343 U. S. 130 (1952), see also *United States* v. *Gollin*, 166 F. 2d 123, 127 (3rd Cir.), cert. den. 333 U. S. 875 (1948); *Sullivan* v. *United States*, 178 F. 2d 723 (D. C. Cir., 1949); *Billeci* v. *United States*, 184 F. 2d 394, 402 (D. C. Cir., 1950); *United States* v. *Link*, 202 F. 2d 592 (3rd Cir., 1953); *Blunt* v. *United States*, 244 F. 2d 355, 365 (D. C. Cir., 1957); *Buchanan* v. *United States*, 244 F. 2d 916, 919 (6th Cir., 1957); *Benes* v. *United States*, 276 F. 2d 99, 102 (6th Cir., 1960); *United States* v. *Kravitz*, 281 F. 2d 581 (3rd Cir., 1961), cert. den. 364 U. S. 941 (1961).

It is, of course, commonplace learning that the right of a federal trial judge to comment on the evidence is not unlimited. *Quercia* v. *United States*, 289 U. S. 466 (1933). The serious problem, however, is how the power is to be limited and yet allowed.

There is no question that the influence of the trial judge upon the jury is of great weight and his every word is received with deference and may prove controlling. In his instructions to the jury the trial judge gives to the jury the last words they hear before their deliberation.

If, as here, the trial has been a long one and the issues complicated the jury will naturally turn to the lone "neutral or unbiased" person in the courtroom. The one person in whom they can place their trust in their efforts to fulfill their sworn duty is in their opinion the trial judge. Therefore, when the court comments upon the evidence, all pre-conceived notions or opinions of the jurors are more than likely disregarded and they strain to glean from his words the indications which they desire.

It would be most unrealistic to assume that the jury would not be swayed by a recital of the facts as given by the judge regardless of how many times he recites the ritual like phrases "* * * you as jurors are the sole judges of the facts." (79a) and "* * * if your recollection of the testimony differs from mine you are to rely on your own recollections." (109a).

It is submitted that it is time in our society to eliminate procedures from criminal trials wherein powers far beyond those present in even the most endowed of human beings are assumed to be present in the average juror.

What positive function is to be performed by placing an additional burden upon the jury as it commences its deliberations? As he leaves the jury box, the conscientious juror must be in a serious quandry, not only must he recall the evidence of a long trial peppered with interruptions and immaterial colloquy but he must apply an in-

volved and sometimes conflicting series of legal principles to that evidence. In addition, when the trial judge chooses to comment upon the evidence the juror must first resolve whatever conflicts may exist between his recollection of the testimony (without benefit of notes) and the court's recitation of the testimony (obviously read from notes taken during the trial). It does not take undue speculation to assume that any sensible and reasonable juror will accept the "recollection" of the court without question. If the court is expert and unbiased then, perhaps, no harm is done but if the court is subject to human frailty or error, who can decide what real harm is caused. Except in extremely aggravated cases the reviewing courts are reluctant to speculate upon the causes of a jury verdict.

The cases such as *Quercia* v. *United States,* 289 U. S. 466 (1933); *United States* v. *Marzano,* 149 F. 2d 923 (2d Cir., 1945); *Billeci* v. *United States,* 184 F. 2d 394 (D. C. Cir., 1950); *Buchanan* v. *United States,* 244 F. 2d 916 (6th Cir., 1957) and *Blunt* v. *United States,* 244 F. 2d 353 (D. C. Cir., 1957) are comparatively easy to decide. It is the borderline case such as the one herein which creates the problem. Who can say whether the jury made its decision upon a full consideration of all of the evidence which was before it or made its decision upon the summary with which it was supplied by the court?

In this case, there was a clear conflict between the versions of the facts as testified to by the witnesses produced by the government and those produced by the defendants. The trial took seventeen trial days and yet the court left the jury with a capsule version of the testimony which in part oversimplified the position of the prosecution and in

part ignored certain aspects of the defense. The comments took no more than 15 or 20 minutes for the court to accomplish and came near the end of the charge.

It is submitted that it is time to expand the language of the District of Columbia Circuit in *Billeci* v. *United States*, 184 F. 2d 394, 403 (D. C. Cir., 1950).

> "The accused has a right to a trial by the jury. That means his guilt or innocence must be decided by twelve laymen and not by one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that the courts have held time and time again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused."

The urged expansion would be to prohibit the court from giving the jury a capsule summary of the evidence, based upon written notes or recollections of the court.

In this case, the court effectively took the determination of the ultimate facts away from the jury and gave them instead a slanted version albeit one which was prefaced with the old standard cautionary instructions that the jury was the sole judge of the facts, etc. No reasoning person could seriously contend that the jury would freely disregard the account.

**2. The instruction of the Court concerning "lawful or unlawful entrapment".**

The Court charged, in part, as follows:

> "By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment." (97a)

It is respectfully submitted that such a statement, particularly when offered as a summary of what has preceded it, can serve only to confuse and befuddle a jury for it essentially constitutes a contradiction in terms. It is respectfully submitted that there is no such thing as a "lawful entrapment" for by its very definition, if there is an "entrapment" it is of necessity illegal and unlawful. Thus, as stated in *Sherman* v. *United States,* 356 U. S. 369 (1958), "Entrapment occurs only when the criminal conducts was the product of the creative activity of law enforcement officials."

It may well be the case that there are reported decisions which use the terms "lawful entrapment" and "unlawful entrapment". But if such be the case it must be borne in mind that such decisions are written for the benefit and edification of the Bench and Bar and not for jurors. Further, it is respectfully submitted, a reading of the decisions on entrapment, even by one trained in the Law, leads one to the conclusion that there are indeed other areas of the law which are far easier to comprehend than this difficult subject which has vexed both courts and lawyers alike.

To make the subject even more confusing for the jury the court then continued its summary by stating that one

induced or persuaded by a law enforcement officer to commit a crime was entitled "to the defense of unlawful entrapment * * *" (97a). It is respectfully submitted that a defendant so induced was entitled to an *acquittal!* As stated by the court the jury could well understand that if it found that a law officer induced the defendants to commit a crime it should then consider the "defense of unlawful entrapment". This is an example of what occurs when improper terms are loosely used.

## CONCLUSION

**The Petitioner was denied a fair trial by a jury as a result of the trial court's delivering an incomplete summary of the evidence to the jury and as a result of the trial court's erroneous instructions concerning the law of entrapment. The Petitioner therefore prays that a Writ of Certiorari be granted.**

Respectfully submitted,

VAN RIPER & BELMONT
By FREDERIC C. RITGER, JR.
744 Broad Street
Newark, New Jersey
*Counsel for Petitioner*

[APPENDICES FOLLOW]

# APPENDIX A

## Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 14874, 14875 AND 14876

---

UNITED STATES OF AMERICA,

*v.*

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER.

WILLIAM J. LAVERICK,
Appellant in No. 14874

HARRISON F. TRYON,
Appellant in No. 14875

MALCOLM SCHAEFFER,
Appellant in No. 14876

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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Argued November 19, 1964

Before: STALEY, GANEY and FREEDMAN, *Circuit Judges.*

## *Appendix A*

OPINION OF THE COURT

(Filed July 15, 1965)

By GANEY, *Circuit Judge.*

This consolidated appeal comes before the Court for review of the conviction of three defendants under Sections 2, 202, 281 and 371 of Title 18, United States Code.[1]

The parties involved are defendant, William J. Laverick, a former Government employee, in charge of a department at Fort Monmouth, New Jersey, whose responsibility it was to certify the technical ability and plant capacity of firms bidding on Signal Corps' contracts and to approve any technical changes in contract specifications. The approval of this department was a prerequisite to receiving an award. Defendant, Harrison F. Tryon, was chief of the Logistics Engineering Division at Fort Monmouth and was a direct subordinate of Laverick's, as well as the custodian of lists containing the specifications of all component parts used in these contracts. Defendant, Mal-

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[1] The relevant provisions are as follows:

§2 Title 18 U.S.C. provides that one who aids or abets the commission of a crime is guilty as a principal.

§202 Title 18 U.S.C. proscribes the receipt of money by an employee of the United States with the intent to have his decision influenced with regard to a matter before him in his official capacity.

§281 Title 18 U.S.C. punishes an employee of the United States who accepts compensation for services which he renders in relation to a matter in which the United States has an interest, before an agency of the United States.

§371 Title 18 U.S.C. prohibits any conspiracy to commit an offense against the United States.

colmn Schaeffer, was a former employee of Laverick's department and later a manufacturer's representative of Consad, Inc., in their attempts to secure contracts with the Government at Fort Monmouth, New Jersey, from March through May 26, 1962, when a retainer of $250 per month was cancelled, but nevertheless, Consad continued getting in touch with him thereafter. Consad, Inc., was an electronic components manufacturer which had, at the time of the alleged crime, a series of bids pending before the Signal Corps at Fort Monmouth, New Jersey. Consad, Inc., had experienced great difficulty in obtaining Government contracts because of its inability to convince the Signal Corps of its capacity to manufacture the finished product.

The facts, briefly stated, are as follows:

Robert Snoyer was president of Consad, Inc., and on June 6, 1962, was in New York City when he received a wire from his office in Santa Monica, California, concerning a certain bid his company then had pending at Fort Monmouth, New Jersey. In order to obtain the requested information, Snoyer attempted to get in touch with his Santa Monica plant, as well as his Monterey plant in California, but was unable to find anyone at either place who could give him the requisite information. He then called the defendant, Schaeffer, at Fort Monmouth, and told him of the wire he had received, and asked him to check into the matter and see if he could identify the equipment. Schaeffer indicated that Snoyer would have the same difficulty he had had in the past with the people at Fort Monmouth, and told him that if he hoped to obtain any business, he would need the help of certain people at Fort Monmouth, and that for a fee of 2% of the contract price he could expect to receive all the approvals necessary to obtain the contract.

Snoyer told him that he would want to meet the principals involved who could deliver the contract and the approvals. Schaeffer told Snoyer that he would come to New York the next morning and he would introduce him to Laverick who was the one who could be most helpful in securing the contract. Schaeffer came to New York on June 7, 1962, and he and Snoyer drove down to Laverick's home and there Snoyer asked Laverick to confirm Schaeffer's statement that what he told him was true and Laverick replied, indicating Schaeffer, "You do what Muggsy tells you to do and everything will be O.K. . . ." To this, Snoyer, answered, "All right." Later, when they were about to leave, Snoyer being somewhat doubtful about the money concerned, since on the way down to Laverick's home Schaeffer had reduced the price from 2% of $2,500,000, or $48,000.00, to $20,000.00 as the amount of the payment, and therefore asked Schaeffer whether Laverick knew about this and was still willing to go through with the deal. Schaeffer thereupon walked apart from Snoyer and whispered something to Laverick which Snoyer testified he could not overhear, but that he heard Laverick's reply, "Yes, you're damn right I will.", and Schaeffer, upon returning to Snoyer, came back and said, "You heard him, so everything is O.K."

Schaeffer then drove Snoyer to Philadelphia, and on the way over, he advised Snoyer to call him the next day and he would tell him what he had to do in California, in order to pass the survey which was necessary for the approval of the contract. Schaeffer and Snoyer also had a discussion on how the tax problem on the money to be paid should be avoided and Schaeffer advised Snoyer that it would be necessary for him to take care of his (Schaeffer's) taxes, inasmuch as Schaeffer insisted that the money was

to be paid directly to him and he would make the proper disposition thereof.

From Philadelphia, Snoyer proceeded to Washington, where he confided what had transpired to one Nicodemus, a newspaper reporter, who had been making a study of procurement orders, who told him to contact the F.B.I., which Snoyer did, and, after five hours discussion with the F.B.I., Snoyer left for California, without signing any statement of the conversation which had ensued.

Snoyer called the next day and was told by Schaeffer that he was sending some documents to him which would be very helpful for the company when the survey team came from Fort Monmouth and arrived at Consad's plant. After Snoyer's arrival in California, he was contacted by the F.B.I. of Los Angeles, and he reported to them that he had received a package from Schaeffer which he brought to the Santa Monica office of the F.B.I. and it was found to contain some provisioning lists and item description lists taken from Signal Corps files. Further testimony showed that these lists were not open to the public, were confidential, and were given to the defendant, Laverick, by the defendant, Tryon, through Tryon's secretary.

After the receipt of these documents by Consad in California, which were sent by Schaeffer and taken to the office of the F.B.I., a series of telephone conversations were had between Schaeffer and Snoyer, which were recorded by the F.B.I., as well as telephone conversations between Snoyer and Laverick and Snoyer and Tryon. These conversations occurred between June 14th and July 11th, and during one such conversation between Schaeffer and Snoyer, Schaeffer advised Snoyer that he should bring East with him between $4,500.00 and $5,000.00 in cash to be paid by

Schaeffer to four people at Fort Monmouth. Snoyer, however, wanted to meet the principals to whom the money was to be paid and Schaeffer was unwilling, saying that he would distribute the same. However, Snoyer withdrew $3,000.00 from the bank and came East with Agent Stein of the F.B.I., the money being identified at the Newark office of the F.B.I., and placed in envelopes, one of which contained an amount of $850.00, the other $750.00. The testimony shows that the F.B.I. gave no instructions to Snoyer other than he was not to give the envelope containing the money to anyone, unless the one receiving it knew it was money, and that there was some basis for the payment of it.

Between June 8th, and June 12th, a survey team, under one Mayerson, visited the Consad plant in California, and made a technical ability evaluation to determine whether it could technically produce the equipment upon which it had bid. A report was filed by the survey team, under Mayerson, stating that Consad was not qualified, and Laverick, though he had authority to overrule the report, did not so do. Snoyer, at this time, was unaware of this conduct on Laverick's part. The Contractor Evaluation Board, the highest authority, with respect to contracts of this nature, also approved the report. Later, Snoyer, upon learning of the unfavorable report which the survey team had made, was assured on or about June 15th, by Schaeffer that certain of the information of the survey team was in error and told Snoyer, "Well, don't worry about that because Bill will overrule them. Don't concern yourself with it." He also advised Snoyer that there were various details that were wrong with Consad's facilities and that was the reason they could not give technical approval, but Schaeffer again assured Snoyer, ". . . that these people would be overruled."

*Appendix A*

An F.B.I. Agent, Colby, testified to a telephone conversation between Snoyer and Tryon on June 20th, in which Tryon stated he was familiar with the entire matter and that he would be able to help Consad after the award was made and that he had already helped, to some extent, with Schaeffer. On July 12, 1962, arrangements were made by Schaeffer for Snoyer to have dinner at the Shadow-Brook Restaurant in Shrewsbury, New Jersey, with Tryon and Laverick and other Fort Monmouth personnel. Snoyer testified, however, that at this meeting Laverick assured Snoyer that the Small Business Administration, which had authority to overrule everything which had gone on before, would grant Consad a Certificate of Competency. He, additionally, assured Snoyer that he was helping all he could with Consad, as was Tryon, and when they had secured the contract, he would make it profitable by ordering spare parts. Snoyer testified that out of the presence of the other persons, he showed Schaeffer the cash he had brought by exhibiting the envelopes containing the cash to him. Schaeffer, likewise, knew at this meeting that the survey team had reported that Consad was technically unqualified to perform the work under their bid. Later in the evening at the Shadow-Brook Restaurant, when Snoyer visited the men's room with Laverick, upon leaving he handed one of the envelopes to Laverick which contained the cash and asked him if he thought he deserved it and Laverick said, "Yes." Later, Snoyer took the defendant, Tryon, aside in the bar, showed him the envelope with the money in it and asked him if he thought he deserved it and he answered, "Yes." Snoyer then gave the envelope to him and Tryon folded it and put it in his pocket. Immediately upon defendants leaving the restaurant, they were arrested which, as has been indicated, was on July 12, 1962.

*Appendix A*

This evidence was presented to the jury, the defendants moved for judgments of acquittal after the Government's case and also after their own case had been presented and both of these motions were denied. After summation of counsel, the case was submitted to the jury which rendered a verdict for the Government and against all three defendants. A motion for a new trial was denied on February 26, 1964, and this appeal followed.

The first reason advanced by the defendants for the new trial is that the charge of the court on entrapment was improper because (1) it did not make any reference as to whether or not there was any "predisposition" on the part of the defendants to commit the crime charged; (2) that the charge of the court with respect to Snoyer being a Government agent was insufficient, and, finally, that the court's use of the phrases "lawful entrapment" and "unlawful entrapment" was prejudicial to the defendant.

At the outset, it may be stated that a careful review of the record indicates plainly that there was no necessity for the court to charge with respect to entrapment. The record clearly shows that the unlawful scheme was conceived in the minds of the defendants, Schaeffer and Laverick, and materially aided by Tryon, and presented to Snoyer, and that everything thereafter done by Snoyer, in cooperation with the F.B.I. agents, was only taking advantage of an opportunity for wrongdoing that they presented and afforded.

While defendants, in their argument and brief, admitted that they do not set out effectively their objection to the court's charge on entrapment, they now assert that the court was in error in not using the specific word "predisposition" in setting forth the requisite state of mind that

should obtain on the part of the defendants in any case of entrapment. However, it is plain that the trial court, in explaining the law of entrapment to the jury, was not bound to use any specific word and, while the court did not mention "predisposition", it did use phrases such as "implants in the mind of an otherwise innocent person", "already disposed . . .", as well as "already has the readiness and willingness to break the law", and similar phrases synonymous therewith. It is obvious that these phrases throughout the court's charge were interchangeable with the specific word "predisposition".

Furthermore, the court stated as follows:

> "You are instructed that entrapment is present when the criminal design originates with an officer or agent of the Government and he implants in the mind of an otherwise innocent person the disposition to commit the offense and induces its commission in order to create the grounds for prosecution. You are further instructed that entrapment is not present when the criminal intent originates in the mind of a person already disposed to the commission of an offense, and the officer or agent of the Government does nothing more than afford that person the opportunity to commit the offense."

Furthermore,

> "By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by a law enforcement officer to commit a crime, he is entitled to the defense of unlawful en-

> trapment because, as I have mentioned, the law as a matter of public policy forbids a conviction in such a case, but on the other hand if a person already has the readiness and willingness to break the law, the mere fact that Government agents provided a favorable opportunity is no defense. This is lawful entrapment."

With respect to the second assertion that the charge with respect to Snoyer being a Government agent was insufficient, it is likewise without foundation. It is obvious that a private individual may only be an entrapping party when an agency relationship exists between himself and the Government. The record herein displays no evidence to support any agency relationship between the Government and Snoyer at the time of the formation of the nefarious scheme and the court's detailed charge, concerning when entrapment is perpetrated by an officer or agent of the Government, was as full and complete as the record warranted. Additionally, a long and intensive cross-examination of Snoyer by defense counsel elicited nothing which could possibly be construed as making Snoyer a Government agent in any entrapment proceeding. This for the reason that Snoyer had no relationship with any Government official until after Schaeffer solicited the payment of money to him, and it is uncontradicted that Schaeffer arranged the meeting with Laverick at his home at which time the plan was perfected and which Tryon later on materially aided.

With respect to the third contention, while the adjectives "unlawful" and "lawful" entrapment might have been somewhat of an over-portrayal in describing the conditions requisite for entrapment, nevertheless, the thought

clearly and carefully embodies that which is necessary and proper under the law. *Sherman* v. *United States*, 356 U. S. 369; *Accardi* v. *United States*, 257 F. 2d 168; *Park* v. *United States*, 238 F. 2d 253; *United States* v. *Romano*, 278 F. 2d 202. Accordingly, it is obvious that the phrases "lawful entrapment" and "unlawful entrapment" comport with the language used by many appellate courts in describing entrapment and the trial court's charge with respect thereto was clear and sufficient.

The basis for the defendant's averment of entrapment, as has been indicated, is that Snoyer sought to lure the defendants into the wrongdoing in order to justify Consad's lack of success in obtaining the Government contracts. All of the facts, as we shall point out in connection therewith, were before the jury and Snoyer vigorously denied any assertion of allurement on his part, or that the telephone calls in July, previously adverted to, were designed with any thought of entrapment. These telephone conversations, in their entirety, show beyond a doubt that they belie any theory of entrapment on the part of Snoyer as a Government agent, but clearly point up only part of the strategem used to afford an opportunity for all of the three defendants to carry out their scheme of wrongdoing. As has been indicated above, the nefarious scheme was broached and implanted in Snoyer's mind by the defendant, Schaeffer, on June 6, 1962, when he stated that for a fee of 2% of the contract price, Snoyer could expect to receive the favorable approval at Monmouth which was necessary to the securance of the contract, all of which was aided and abetted by Laverick and Tryon, as herein indicated, and, accordingly, it cannot be reiterated too often that all the F.B.I. did was to afford an opportunity through Snoyer for the defendants to commit the crime charged.

*Appendix A*

Another argument advanced by the defendant is that the charge of the court, in its summary, was one-sided and emphasized the Government's case to the exclusion of the defendant's case. Here, there was no objection to the court's charge with respect thereto at the close of the case and whatever warrant there is to this assertion must be found under the Plain Error Rule of Rule 30. There was denial by the defendants of all the allegations of the Government's witnesses and the contentions of both parties were properly laid before the jury, and a careful scrutiny of the record shows no prejudice in the court's charge, for it is abundantly clear that the court lent equal weight to both the evidence produced by the Government, as well as that produced by the defendants.

The next objection raised by the defendant is that the court permitted certain questions to be addressed to the defendant, Laverick, which were prejudicial to him before the jury. One of the objected areas involved the cross-examination of Laverick with respect to his savings account and investments, while the other dealt with his ownership of a race horse. However a reading of the record shows that on direct-examination Laverick was questioned as to his financial situation and opened the door for the questions posed on cross-examination and were asked to test his credibility with respect to his financial situation and, accordingly, proper. The facts in this case pose nothing of the situation presented in *Berger* v. *United States,* 295 U. S. 78, at 84, where the Government exceeded the bounds of cross-examination in large measure by permitting to go to the jury incompetent hearsay evidence. There was ample basis here for the cross-examination involved. Again here, it was the defendant's own objection which prevented the Government from proving the allegations in connection with

his large purchases of stock and a race horse and, accordingly, no prejudice resulted since the court, in its charge, said: "I further charge you that whenever the Court has sustained an objection to the question you may draw no inference from the wording of that question or speculate as to what the witness would have said if permitted to answer, nor can you assume that any party has objected to a question because that side expected the answer, if any, to be unfavorable." Accordingly, if any prejudice could have properly accrued to the defendant by this question, it was cured by the court's charge.

Finally, certain objections were raised as to the sufficiency of the indictment. However, an indictment should be construed broadly in favor of the Government after a verdict has been rendered thereon. *Hagner* v. *United States*, 285 U. S. 427, at 431. This rule is particularly applicable here where the defendant made no specific objection to the indictment by means of any pre-trial motion. However, objection is urged to the indictment here that it was insufficient, in that each count in Count I and II alleged the statutory offense in the disjunctive or alternative. Here again, counsel is urging, for the first time, this specific objection. The cases are unanimous in holding that merely technical defects are waived when no objection is made to them at trial. Rule 12(b)(2). What is really here adverted to is that the indictment is duplicitous, to which the Government answered that there is, in fact, no duplicity, nor did any ever exist, as there is no danger in the allegations that a conviction or acquittal of the defendants would fail to bar a subsequent criminal prosecution on the grounds of double jeopardy. The essence of the crime here charged is the receiving of the money, not the quid pro quo received or promised for that money, and where the statutes use the

disjunctive to describe the alternate means of committing the same statutory offense and only one crime is charged, the means of commission are permissible. *United States* v. *Johnson*, 207 F. 2d 314.

The other reasons asserted for a new trial are without merit.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

# APPENDIX B

## Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 14874, 14875 AND 14876

---

UNITED STATES OF AMERICA,

*v.*

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER.

WILLIAM J. LAVERICK,
Appellant in No. 14874

HARRISON F. TRYON,
Appellant in No. 14875

MALCOLM SCHAEFFER,
Appellant in No. 14876

(D. C. Criminal No. 537-62)

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY

---

Present: STALEY, GANEY and FREEDMAN, *Circuit Judges.*

*Appendix B*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the District Court, filed March 17, 1964 and entered March 19, 1964, be, and the same are hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Deputy Clerk

July 15, 1965

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 560

WILLIAM J. LAVERICK, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 563

MALCOLM SCHAEFFER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

***ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT***

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

**The opinion of the court of appeals (No. 560, Pet. App. 6–19; No. 563, Pet. App. 1a–14a) is reported at 348 F. 2d 708.**

**JURISDICTION**

**The judgment of the court of appeals was entered on July 15, 1965 (No. 563, Pet. App. 15a–16a). The**

time for filing petitions for writs of certiorari was extended to and including September 13, 1965, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

In No. 560:

1. Whether the court erred in admitting transcripts of telephone conversations between a government witness and petitioners, overheard and recorded by an F.B.I. agent with the consent of the government witness.

In No. 563:

2. Whether the court's summary of the evidence in its charge placed undue emphasis upon the government's case.

3. Whether the court erred in giving an instruction referring to "unlawful" and "lawful" entrapment.

## STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner Laverick (No. 560), a government employee, was convicted of violating 18 U.S.C. 202 and 281 by accepting money paid to influence his official conduct and to secure his services relating to a matter, pending before a federal agency, in which the United States was interested. Petitioner Schaeffer (No. 563) was convicted of aiding and abetting these offenses and, along with petitioner Laverick, of conspiring to commit

them (App. 4a, 7a–13a).[1] Laverick was sentenced to two years' imprisonment on the conspiracy count, followed by suspended sentences and probation on the substantive counts (App. 5a). Schaeffer was sentenced to imprisonment for two years on the conspiracy count and one year on each of the substantive counts, all to be served concurrently (App. 5a). On appeal, the convictions were affirmed (App. 126a).

Laverick was the director of the Production Engineering Department at Fort Monmouth, New Jersey (App. 77b) and Schaeffer was a former employee of Laverick's department and later a manufacturer's representative for Consad, Inc. (App. 75a, 19b, 78b–79b), an electronic components manufacturer with a history of unsuccessful attempts to obtain government contracts (App. 62a, 18b–19b). On June 6, 1962, one Snoyer, president of Consad, telephoned Schaeffer to ask whether he could identify certain equipment involved in bids which were then pending at Fort Monmouth (App. 20b–22b). After answering Snoyer's question, Schaeffer remarked that, without the assistance of certain people at Fort Monmouth, Consad would probably be unsuccessful in the pending bidding. Schaeffer stated that, for a fee of two percent of the contract price, Snoyer could expect to receive all the approvals necessary to obtain the contract (App. 22b). Snoyer expressed a desire to meet the

[1] "App." refers to the printed appendices filed in the court below. "Tr.", preceded by a witness's name, refers to the typewritten transcript of the named witness's testimony in the trial court.

principals who could deliver the approvals, and Schaeffer arranged for him to meet with Laverick, who he said would be helpful (App. 23b–24b). Snoyer met with Schaeffer and Laverick on June 7, at which time Laverick indicated that, if Snoyer followed Schaeffer's instructions, he could expect the necessary approvals (App. 24b–25b).

Shortly after this meeting, Snoyer reported the incidents mentioned above to the F.B.I. in Washington, and on June 10, F.B.I. agents communicated with him in California (App. 25a–28a, 33a–35a, 26b, 54b, 56b). On June 11, Snoyer turned over to the agents confidential Signal Corps provision lists which had been sent to him by Schaeffer, who obtained them from Laverick (App. 28b–29b, 30b–31b, 79b–80b). At that time, Snoyer requested that the agents be present when he discussed the contract with petitioners in the future and that some record of the conversations be maintained. In response to this request, the agents offered the suggestion that they monitor and record his telephone conversations with petitioners, which Snoyer thought "was a very fine idea" (App. 36a–37a). A tape recorder, with a headset through which an agent could overhear the conversations, was connected with a telephone in an apartment rented by the F.B.I. across from Snoyer's office (Colby Tr. 2). It was decided that, when Snoyer received a call from one of the petitioners, his secretary would inform the caller that her employer was out and would call back; Snoyer would then go to the F.B.I. apartment and

return the call. Primarily under this procedure,[2] Snoyer made fifteen monitored phone calls between June 14 and July 11—thirteen to Schaeffer, one to Laverick, and one to a subordinate of Laverick, co-defendant Tryon (Colby Tr. 2–3, 15).[3]

When Snoyer complained to Schaeffer, in a telephone conversation on June 15, of a survey team's adverse report on Consad's facilities, Schaeffer replied, "Well, don't worry about that because Bill [Laverick] will overrule them" (App. 31b). In a telephone conversation on June 20, Laverick, who had the authority to overrule the survey team (App. 63a), assured Snoyer that he "still intended to overrule these people" and to give Consad "technical approval" on the contract (App. 33b–34b). In another of the telephone conversations, Schaeffer instructed Snoyer to bring $8,500 for Schaeffer and $5,000 for four other people when he next came East (App. 42a–43a, 38b, 92b). On July 12, Snoyer met with petitioners and other Fort Monmouth personnel. At that time, Snoyer showed Schaeffer the money he had brought

[2] Some of the calls, for example the one to Laverick, were entirely initiated by Snoyer (see Colby Tr. 30–38).

[3] After testifying as to the substance of these telephone conversations, Snoyer, in order to refresh his recollection, was permitted to refer to transcripts of the recordings which had been prepared by the F.B.I. (Snoyer Tr. 368–369, 372–376, 498–500). Agent Colby was permitted to read two transcripts he had prepared of conversations on June 20, 1962 between Snoyer and Tryon and between Snoyer and Laverick. The agent stated that he had made certain corrections in the transcripts, in view of his recheck of the recordings, and the court ruled that it would be best for him to read the corrected "accurate verbatim statement" (Colby Tr. 15–39).

to pay Laverick but rejected Schaeffer's request that he, rather than Snoyer, make the payments (App. 39b–40b, 45a). At the meeting, Laverick told Snoyer that he had done everything possible to procure approval of the contract and that he would provide further assistance after the contract was awarded (App. 40b–41b). Snoyer made the promised payments in bills whose serial numbers had previously been recorded by the F.B.I. (App. 42b–43b, 43a–44a). Immediately upon leaving the place where the payments were made, petitioners were placed under arrest (Laverick Tr. 70; Schaeffer Tr. 201–203).

## ARGUMENT

1. The question presented in the petition in No. 560 was neither raised nor considered in the court of appeals. Except in extraordinary situations, not present here, this Court has consistently refused to consider issues tendered under these circumstances. *Husty* v. *United States*, 282 U.S. 694, 701–702; *Duignan* v. *United States*, 274 U.S. 195, 200. Nor does this question appear to have been raised in the trial court. Although admission of the transcripts of the monitored recordings was objected to, the only grounds stated in the record were the best evidence rule, hearsay, and variations on these two grounds (Colby Tr. 3–4, 9–12).[4] We submit, therefore, that the question has not been preserved for review in this Court.

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[4] After overruling these objections, the court suggested "for some enlightenment on the subject * * * in connection with eavesdropping of this kind" (Colby Tr. 13) that counsel read

In any event, petitioner's contentions are insubstantial. The admissibility of telephone conversations with a government witness, monitored and recorded with the witness's consent, is well established. See *Rathbun* v. *United States*, 355 U.S. 107; *Carnes* v. *United States*, 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861; *Ferguson* v. *United States*, 307 F. 2d 787 (C.A. 10), reversed on rehearing on other grounds, 329 F. 2d 923; *Lindsey* v. *United States*, 332 F. 2d 688, 691 (C.A. 9); cf. *Lopez* v. *United States*, 373 U.S. 427. The fact that the conversations were overheard through the use of special equipment and the recordings were transcribed for use at the trial is of no significance. As the Fifth Circuit pointed out in *Carnes*, after careful analysis of the authorities: "The significant fact in the cases where eavesdropping has been approved is that a third person is listening to a conversation directly, or indirectly through an electrical device, with the consent, and often assistance, of one of the parties, and that the other party does not know that his words are overheard. Both the consenting party and the third party would be free to divulge the contents of the conversation in the courtroom or elsewhere; the only function served by the recording is to preserve a permanent and accurate record of the conversation" (295 F. 2d at 602).

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certain of the cases we cite in the next paragraph of this brief. Whether this remark was prompted by some objection of defense counsel or reflected the trial judge's prepared response to an objection which was anticipated, though never made, is unclear.

Snoyer, who consented to[5] and assisted in the recording of his conversations, personally testified as to the conversations and was available for cross-examination. The court properly permitted him to refresh his recollection of the conversations, during cross-examination, by referring to the transcripts of the recordings, even though he had not prepared the transcripts himself. They were relevant documents which did refresh his memory and which were used only for that purpose. See Wigmore, *Evidence* (3d ed.) §§ 758, 759. It was also proper to permit the monitoring agent to read from the transcripts, since these—like the recordings of which they were verbatim renditions—were "trustworthy evidence" of the conversations.[6] See *Carnes* v. *United States*, *supra*, at 602.

2. Contrary to petitioner Schaeffer's contention (No. 563, Pet. 16–19), the trial court showed no par-

[5] Contrary to petitioner's contention (No. 560, Pet. 13, n. 7), there was no evidence that Snoyer's consent was involuntary. He gave the agents written permission to record each call (*e.g.*, Snoyer Tr. 334; App. 39a), and testified that he thought making such recordings "was a very fine idea" (App. 37a). Indeed, although "the technical method of doing it" was suggested by the F.B.I., it was Snoyer himself who requested that some record of his conversations with petitioners be maintained (App. 36a–37a). Moreover, the very manner in which the calls were placed (see Statement, *supra*, pp. 4–5) evinces full accord and cooperation on Snoyer's part.

[6] There is no contention that the transcripts did not accurately reflect the recorded conversations. Petitioner Laverick consented to the omission of profanity in the reading of his conversation with Snoyer to the jury (Colby Tr. 17). Had the recording itself been played for the jury, the omission of profanity would have been extremely difficult, if not impossible.

tiality in its charge to the jury. Noting that this objection to the charge had not been made in the trial court, the court of appeals nevertheless carefully scrutinized the record and concluded (No. 560, Pet. App. 17; No. 563, Pet. App. 12a): "[I]t is abundantly clear that the court lent equal weight to both the evidence produced by the Government, as well as that produced by the defendants." (For the trial court's references to defense testimony and contentions, see, *e.g.*, App. 102a, 103a, 104a–105a, 106a–107a, 108a.) The court expressly charged that, if the jurors' recollection of the testimony was different from that of the court, they should rely upon their recollections, and that the court's only purpose in summarizing the evidence was "to associate the general tenor of it with the issues before you, to trace a sequence, a skeleton outline, the details of which are filled in by all of the testimony" (App. 109a). The court instructed that the jurors should remove from their minds any possible impression that the court was "inclined to favor the case of the Government or the case of any defendant," and it told the jury that they were the sole judges of the facts (App. 114a–115a).

3. As the court below accurately pointed out, there was no necessity for the trial court to give a charge with respect to the defense of entrapment (No. 560, Pet. App. 13; No. 563, Pet. App. 8a). The evidence showed that Snoyer had no relationship with any F.B.I. official until after petitioners had solicited from him the payment of a bribe.

In any event the instruction was not erroneous merely because it mentioned a difference between "unlawful" and "lawful" entrapment. The court charged accurately on the general principles of entrapment (App. 95a–97a) and then stated as follows (App. 97a):

> By way of summary as to this defense of entrapment, I charge you that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by a law enforcement officer to commit a crime, he is entitled to the defense of unlawful entrapment because, as I have mentioned, the law as a matter of public policy forbids a conviction in such a case, but on the other hand if a person already has the readiness and willingness to break the law, the mere fact that Government agents provided a favorable opportunity is no defense. This is lawful entrapment.

While "lawful" and "unlawful" entrapment may not be artful phraseology, there was no possibility of confusion. The charge conveyed the same idea which this Court expressed in *Sherman* v. *United States*, 356 U.S. 369, 372: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." See also *Trice* v. *United States*, 211 F. 2d 513, 516–518 (C.A. 9), certiorari denied, 348 U.S. 900.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writs of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*
FRED M. VINSON, JR.,
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BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
*Attorneys.*

OCTOBER 1965.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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## No. 560

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WILLIAM J. LAVERICK,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## PETITIONER'S REPLY BRIEF

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Wilson v. United States, 316 F.2d 212 ..... App. 12, 13


**Statutes:**


Federal Communications Act,
Section 605 (48 Stat. 1103; 47 U.S.C.,
1962 ed., §605) ..... App. 2, 5, 10, 11, 12, 13, 15

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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## No. 560

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WILLIAM J. LAVERICK,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## PETITIONER'S REPLY BRIEF

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Petitioner, pursuant to Rule 24-4, Supreme Court Rules, submits this brief in reply to certain of the contentions raised by the Government in its brief in opposition (Govt. Br.) to the petition for a writ of certiorari.

1. The Government contentions to the contrary (Govt. Br. 6) notwithstanding, the record is amply clear that the questions presented in No. 560 were indeed raised in and considered by the trial court.

(a) Rather than basing the objections solely upon the best evidence rule, hearsay, and variations of these two rules, as the Government contends (Govt. Br. 6), counsel for petitioner specifically objected to the admission of the testimony by the F.B.I. agent and/or the transcripts of the recordings monitored by such agent on the ground that any such testimony was inadmissible under the rule of the "*Rathbun* case, in which the Supreme Court made the decision" on this "complex question". (Colby (37) 5-6.) And because of the importance of the complex problems involved, the trial court, on January 23, 1964, continued for one day the Government's examination of its agent, in order to consider petitioner's several objections to the admissibility of such testimony (Colby (37) 5-9), as well as the memoranda of law filed by petitioner and the Government and accepted by the trial court. Both the petitioner's memorandum (set out, in pertinent part, in Appendix A, *infra*) and the Government's memorandum (Appendix B, *infra*) extensively analyze the holding in *Rathbun v. United States*, 355 US 107, along with certain of its ancestors (including *Goldman v. United States*, 316 US 129) and its progeny. Consequently, there is absolutely no substance or foundation for the Government's conclusion that the court had possibly anticipated an objection which was never made when it suggested that "for some enlightenment on the subject" counsel should read, among "many other cases bearing on this subject", the cases of *Rathbun v. United States, supra; Carnes v. United States*, 295 F 2d 598 (CA 5); *Ferguson v. United States*, 307 F 2d 787 (CA 10); and *Lopez v. United States*, 373 US 427 (Govt. Br. 6-7, n 4; Colby (37) 13); to the contrary, such cases, as well as others, were for the most part specifically called to the court's attention by both

the petitioner and the Government in their memoranda of law. (Appendices A and B, *infra.*)

(b) In addition to *Rathbun, supra,* petitioner further objected to admission of the agent's testimony "as a legal matter under all the legal decisions" (Colby (37) 5), objecting that such testimony, not being that of Snoyer who was a party to such conversations, was inadmissible because it went far beyond attempted corroboration of Snoyer's testimony (Colby (37) 6); and that such testimony was inadmissible because the Government's deliberate conduct in calling the agent to testify by reading into evidence the transcripts, when the key Government witness, Snoyer himself, was available to testify as to such conversations, was a matter of strategy or tactics most prejudicial to petitioner (Colby (37) 9-11). In view of such specific objections it is readily understandable why the trial court deemed it necessary to expressly refer to *Lopez, supra,* in explaining his ruling on admissibility (Colby (37) 13), since such objections are certain of the precise important problems with which the Court expressed concern in *Lopez.* For example, both the majority and concurring opinions in *Lopez* distinguished that case from the present situation by carefully pointing out that such electronically obtained evidence there was not used so as to circumvent production of the key government witness who was a party to the conversation (as in *On Lee v. United States,* 343 US 747); the recording was properly introduced, the Court held, solely to corroborate the contents of "a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." (373 US at 439; see also Warren, C.J. concurring at 442.) However, such opinions were

## APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

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**Criminal No. 537-62**

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UNITED STATES OF AMERICA

v.

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER,

*Defendants.*

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## MEMORANDUM OF LAW

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### STATEMENT OF FACTS

The Government alleges the following: That this case was initiated when Robert S. Snoyer voluntarily gave a statement to the F.B.I. in Washington on June 8, 1962. As a result of this statement, arrangements were made to record conversations which he had with the defendants in the case at bar. The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H.

A single pair of wires were attached to the incoming telephone pair at the connector block in the base board in the apartment and was connected to the "bridge" of

the amplifier. This connecting block is located on the baseboard of the room in which the telephone is located and is about nine feet from it.

Recordings were made of conversations between Snoyer and Laverick; Snoyer and Schaeffer; and Snoyer and Tryon. All of these recordings were made with Snoyer's full knowledge, cooperation and consent.

The defendants contend that none of the recordings referred to hereinabove are admissible in evidence and will reply, in support of their position, upon the law and argument set forth herein

## QUESTIONS PRESENTED

1. The first question presented in this memorandum is whether telephone conversations overheard and recorded with the consent of one party thereto are in violation of Section 605 of the Federal Communications Act when recorded in the manner described in the Statement of Facts.

2. The second question presented in this memorandum is whether telephone conversations which have been overheard and recorded are admissible in evidence when statements made by one of the parties to the conversation, who is not a co-defendant in the action, violate the basic rules of evidence.

## ARGUMENT

### POINT I

**THE RECORDING OF A TELEPHONE CONVERSATION WHICH HAS BEEN OVERHEARD AND RECORDED WITH THE CONSENT OF ONE OF THE PARTIES TO THE CONVERSATION IS NOT ADMISSIBLE IN EVIDENCE WHEN THE CONVERSATION OF THE PARTIES HAS BEEN INTERCEPTED IN VIOLATION OF SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT.**

The general law on this subject has been adequately referred to in the government's brief and nothing is to be gained by a recital of same herein.

The government, of course, relies upon *Rathbun v. United States, 355 U.S. 107 (1957)* as establishing the basic law now existing, and upon *United States v. Carnes, 295 F. 2d 598*, as summarizing the current authority for its position.

It is not the intention of the defendants to disagree with the holding in either of the two cases cited, or the holding of the many cases cited in the *Carnes* case.

It *is* the intention of the defendants, however, to *differentiate* the case presently before the Court from the cases cited in the government's brief and, in doing so, to argue that because of these differences the holdings in the cited cases are not applicable.

First, let us consider the *Rathbun* case. In its decision the Supreme Court specially took note of the fact that the communication was heard on a "*regularly used* telephone extension". In reciting that the calls were overheard on an extension phone the Court specifically noted that, "This extension had not been installed there just for this purpose but was a regular connection, previously placed and normally used". On Page 136 the Court then noted that if the claim of the Petitioner was accepted by the Court it would have to hold that Congress intended to place a severe restriction on the "ordinary use" by a "subscriber". The Court then went on to state that it would not deny "subscribers" the right to "ordinary use" of the phone, etc. It then concluded by reciting that it would not prohibit a friend, family member, employee or even the police from listening in on a conversation "to which a subscriber is a party".

The defendants herein contend that the recital of the foregoing facts by the Supreme Court was for a reason, i.e to limit its holding to the "ordinary use" of a phone by a "subscriber".

In the case presently before the Court none of the foregoing facts were present. Snoyer, the "consenting" party to the phone conversations was not a "subscriber"; nor was the phone put to its "ordinary use". The first two recordings were made at the Santa Monica office of the F.B.I. and it is Counsel's recollection that the thirteen recordings which followed were all made at a different F.B.I. office.

If the foregoing be true, it is the contention of the defendants that the situation involving the recordings to

be offered by the government is so different from the factual situation existing in the *Rathbun* case that the defendants are not bound by that holding.

There is another important distinction to be noted. In the *Rathbun* case the conversation was overheard on an extension phone. The rationale of the Court was that the receiver of the call had the right to tell another of the conversation. Since he could do this, the Court reasoned, he could, instead, hold out the handset so another could hear it. The Court then concluded that in view of the foregoing there was no difference between the last action and listening in on an extension. The Court then went on to say that when one party called another he always took the risk that someone might listen in on an extension phone. Therefore, the Court held, there was no interception as prohibited by Sec. 605 of the Communication Act.

It may be noted at this point that there is a vast difference between listening in on an extension and listening in as the F.B.I. did in the case before the Court but Counsel will come back to this point.

In the *Carnes* case cited above, and relied upon by the government, the conversation was overheard by means of *an attachment placed on the earpiece of a phone.* The *Carnes* case cites many cases and in each of the cited cases the conversations were overheard either by listening in on extension phones or through induction coils placed on the receiver as a result of which the voice coming through the receiver was magnified.

The *Carnes* case cited with approval *United States*

*v. Yee Ping Jong, 26 F. Supp. 69, 70* in which the Court, in upholding the admissibility of an overheard conversation, held that *the conversation was not obtained by a tapping of the wire.*

The *Carnes* case also noted with approval the *Goldman* case, *Goldman v. United States,* (1940) *316 U.S. 129, 86L. Ed. 1322* in which a detectophone was inserted in a partition wall. In holding this admissible the Court noted that "intercept" indicates the taking or seizure *by the way or before arrival at the destined place.*

It is now important to note that in all of the cases cited above (*including the Rathbun case*) the overhearing of the conversations was upheld because, *in every instance* the conversation was overheard either at the same time or after it emanated from the receiver! It is also to be noted that in *None* of the cited cases was anything done or any conversation heard *before* the voice emanated from the receiver. Or, as stated in the *Yee Ping* case, *the conversation was not obtained by a tapping of the wire.* The facts in the case now before the Court are *different* from just about every recorded case (except the *Stephenson* case cited below) and thus, the Court has before it *a case of novel impression!*

As indicated in the Statement of Facts the F.B.I., in overhearing the conversations between Snoyer and others, *tapped the wire* and attached a pair of wires to the connector block in the baseboard; this connector block was about nine feet from the phone. This method of overhearing a conversation, it is submitted, constituted an interception for it intervened between the two parties to the conversation!

In *Carbo v. United States*, (1963) *314 F. 2d 718* the Court stated that it did not understand that the mechanical nature of the method of overhearing was to be the guidepost but apparently did not feel too sure of this statement for it took pains to point out that in that case an induction coil was used; the Court then carefully explained that an induction coil was in the nature of a tuning fork and added: "There is no physical connection with or interruption of the telephone electrical circuit".

The situation described in *Carbo*, it is respectfully submitted, is far different from the case under consideration wherein there *was* a physical connection with *and* interruption of the telephone electrical circuit.

In closing, the Court's attention is directed to *United States* v. *Stephenson*, D.C. 1954, 121 F. Supp. 274, cited in the *Carnes* case. Counsel did not read this case because he did not have the Federal Supplement available. However, the *Carnes* case indicates that the conversation was recorded by a device attached to the wiring of a telephone box and the Court stated: "Both in space and time, the talking in this instance was before the arrival of the communication at the destined place."

The facts in the subject case are much stronger than in the *Stephenson* case and are truly novel for there appears to be no recorded case "on all fours".

In conclusion, the defendants contend that there is no recorded factual case which would be binding on the defendants for no recorded case covers a situation similar to the one before the Court. However, all the cases, from

*Rathbun* to date, either hold or indicate that an interruption in the call, a connection made *between* the two parties, a tapping of the wires, or a physical connection with or interruption of the telephone electrical circuit would constitute an interception. All of these conditions are to be found in the subject case as a result of the novel manner in which the calls were tapped and it is therefore respectfully submitted that the recordings are inadmissible in evidence.

## APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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Criminal No. 537-62

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UNITED STATES OF AMERICA

v.

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER,

*Defendants.*

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## MEMORANDUM OF LAW

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David M. Satz, Jr.
*United States Attorney*

On the Brief:

Matthew P. Boylan, Assistant U. S. Attorney
Robert A. Baime, Assistant U. S. Attorney

## STATEMENT OF FACTS

This case was initiated when Robert S. Snoyer voluntarily gave a statement to the F.B.I. in Washington on June 8, 1962. As a result of this statement, arrangements

were made to record conversations which he had with the defendants in the case at bar. The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H.

A single pair of wires were attached to the incoming telephone pair at the connector block in the base board in the apartment and was connected to the "bridge" of the amplifier. This connecting block is located on the base-board of the room in which the telephone is located and is about nine feet from it.

Recordings were made of conversations between Snoyer and Laverick; Snoyer and Schaeffer; and Snoyer and Tryon. All of these recordings were made with Snoyer's full knowledge, cooperation and consent.

## QUESTION PRESENTED

The question presented in this memorandum is whether conversations overheard and recorded with the consent of one of the conversants is admissible in evidence. The basis for raising the question is Section 605 of the Federal Communications Act which in pertinent part reads:

> " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the extents, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . "

## ARGUMENT

The first United States Supreme Court case to comprehensively consider the problems raised by Section 605 was *Rathbun v. United States* 355 U.S. 107 (1957). The complaining witness in that case had been threatened by telephone and had notified the police. The police, anticipating further threats, accompanied the witness to his home where they overheard a threatening conversation on a telephone extension. The Court held that this did not constitute a violation of Section 605. The Court's rationale was that there had been no interception of the telephone call. Any apparent interception would be vitiated by the fact that one of the parties had consented. At Pages 110 and 111, the Court said:

> "The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it (citing *United States v. Polakoff* 112 F.2d 288). The conduct of the party would differ in no way if instead of repeating the message, he held out his hand set so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose."
>
> " . . . Common experience tells us that a call to

a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place, there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, interception, has not occurred."

It is apparent that, under the reasoning of *Rathbun*, the recorded conversations in the present case are not objectionable. In the case at bar, one of the parties to the conversation, Snoyer, invited members of the F.B.I. to listen in on the conversation. Then the F.B.I.'s recording of that conversation cannot be considered as an "interception".

There are several recently decided cases directly on point. In *Carbo v. United States* 314 F.2d 718 appeal pending (9th Cir. 1963), a person named Leonard had received threats by telephone. He notified the F.B.I. and they, by means of an induction coil, recorded the next threat which he received. The Court held, citing *Rathbun*, that the use of an induction coil in recording a conversation with the permission of one of the parties was not an interception within the meaning of 47 U.S.C., Section 605.

A similar case is *Wilson v. United States*, 316 F.2d 212 (9th Cir. 1963). In that case, a "special employee" of the Government placed a call to the defendant. The

ensuing conversation contained incriminating statements with regard to the sale of narcotics. The "special employee" recorded the conversation by means of a "special device" attached to the receiver. This "special device" also permitted a Federal Agent to overhear the conversation. At the trial, only the "special employee" testified with regard to the contents of the conversation. However, objections were made to the use of the listening device in the investigation. The Court held at Page 213:

> "Assuming for argument that the point is available, the cases are clearly adverse to appellant. . . (citations omitted) . . . "
>
> "The cases hold that testimony as to a telephone conversation listened to with the consent of only one of the parties to the conversation does not constitute an interception under Section 605 of the Federal Communication Act (47 U.S.C.A. Section 605); and (except for Rayson and Bookie, which did not reach the question) that such testimony does not become inadmissible simply because it was recorded by or overheard by an electrical or mechanical device attached to an extension telephone or telephone wiring to the locality of the consenting party." See also *Broadus v. United States*, 317 F.2d 212 (5th Cir. 1963); *Ladery v. Commission on Licensure to Practice, etc.* 261 F.2d 68 (C.A.D.C. 1958); *United States v. Williams*, 311 F.2d 721 (7th Cir. 1963).

The case of *Ferguson v. United States* 307 F.2d 787 (10th Cir. 1962) is also Apposite. There, as in *Wilson*, a

volunteer "special employee" of the Government recorded an incriminating statement by means of a device on an extension phone. The 10th Circuit held that the evidence was admissible and that no violation of Section 605 of the Federal Communications Act had taken place. See also *United States v. Williams* 311 F.2d 721 (7th Cir. 1963) Cert. denied, 374 U.S. 812, 83 S. Ct. 703, 10 L. Ed. 2d, 1035 (1963) where the 7th Circuit held evidence to be admissible on similar facts.

The case of *United States v. Carnes*, 295 F.2d, 598 cert. denied, 369 U.S. 891 (5th Cir. 1962) examines the present status of Section 605 of the Federal Communications Act. In the *Carnes* case a Federal officer, working undercover arranged to buy non-tax-paid whiskey from the defendant. During the negotiations for this sale the Federal agent recorded several conversations which he had with the defendant. These recordings were made by means of an attachment placed on the earpiece of the agent's telephone. The Court held that the recordings made by the agent were admissible in evidence and that they had not been procured in violation of the Federal Communications Act. In the course of the opinion the court deals comprehensively with the other decided cases in this area. The court points out that even prior to *Rathbun*, most of the Federal District Courts were accepting evidence obtained through the recording of telephone conversations if these recordings were made with the consent of one of the parties to the conversation. Judge Wisdom pointed out:

> "The Supreme Court, in *Rathbun v. United States*, 1957, 355 U.S. 107 78 S. Ct. 161, 2 L.Ed.

2d 134, stamped its approvel on the conclusion supported by this increasing weight of authority. Police officers were allowed to listen on an extension line to a telephone conversation in which the defendant threatened the life of the man he had called. In holding the testimony admissible, the Supreme Court scotched the theory that the consent of each party to a conversation must be obtained before a communication may be divulged."

The Court then went to summarize the effect of *Rathbun* and the later cases upon Section 605. The Court said:

"Two major principles may be extracted from these cases. First, testimony as to a telephone conversation listened to with the consent of only one of the parties to the conversation is not inadmissible under Section 605. Second, such testimony does not become inadmissible simply because it was recorded by an electrical or mechanical device attached to an extension phone or telephone wiring at the locality of the consenting party. The significant fact in the cases where eavesdropping has been approved is that a third person is listening to a conversation directly or indirectly through an electrical device, with the consent, and often assistance, of one of the parties, and that the other party does not know that his words are overheard. Both the consenting party and the third party would be free to divulge the contents of the conversation in the courtroom or elsewhere; the only function served by the recording is to preserve a permanent and

> accurate record of the conversation. In the case at bar this point is particularly clear since the recording was made by the very individual who was participating in the conversation. Taking a sensible view of it, the only difference between a person testifying to a conversation which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evidence (assuming a showing that the tape has not been tampered with)."

The *Carnes* case thus serves to summarize the authority with regard to the question with which we are herein concerned. Although there had been some doubt expressed in a minority of the jurisdictions as to the admissibility of evidence obtained through a listening device, the *Rathbun* case set a standard which all subsequent cases cited herein have followed. It is, therefore, evident that the prohibition of Section 605 is limited to an "interception" made without the consent of either of the parties. The interpretation given to the *Rathbun* case in the 9th, 5th, 10th, 7th, and District of Columbia Circuits is well supported by the rationale of that case. The facts of the case at bar come squarely within the aforementioned authority and, therefore, the recorded conversations which were made with Snoyer's consent and cooperation are admissible.